DOCKET

(6)

No. 83-1329-CSH Title: Joseph Ponte, Superintendent, Massachusetts Correctional Institution, Walpole, Petitioner
Status: GRANTED v.
John Real

Docketed:
February 7, 1984 Court: Supreme Judicial Court of Massachusetts

Counsel for petitioner: Smith, Barbara A. H.

Counsel for respondent: Shapiro, Jonathan

Entry	Date	Note	Proceedings and Orders
1	Feb 7 1984	G	Petition for writ of certiorari filed.
2	Mar 14 1984		DISTRIBUTED. March 30, 1984
3	Mar 29 1984	P	Response requested. (Due April 28, 1984 - NONE RECEIVE
5	Apr 30 1984		Order extending time to file response to petition unti May 14, 1984.
6	Jun 13 1984		REDISTRIBUTED. September 24, 1984
7	Oct 1 1984		Petition GRANTED.
8	Oct 1 1984		DISTRIBUTED. October 5, 1984. (Matter of appointment - amicus curiae - to brief and argue in support of the
9	Oct 1 1984		judgment below - respondent is in prison).
10	Oct 15 1984	G	Motion of respondent for leave to proceed further here in forma pauperis filed.
11	Oct 29 1984		Motion of respondent GRANTED.
12	Nov 15 1984		Brief of petitioner Ponte, Supt. filed.
13	Nov 17 1984		Joint appendix filed.
14	Dec 4 1984		SET FOR ARGUMENT. Wednesday, January 9, 1985. (3rd case).
15	Dec 10 1984	G	Motion of Barbara A. H. Smith, Esq., to permit Martin Levin, Esquire, to present oral argument pro hac vice behalf of petitioner filed.
16	Dec 6 1984		CIRCULATED.
17	Dec 10 1984	X	Brief of respondent John Real filed.
18	Jan 2 1985	X	Reply brief of petitioner Ponte, Supt. filed.
19	Dec 24 1984		Record filed.
20	Jan 7 1985		Motion of Barbara A. H. Smith, Esq., to permit Martin Levin, Esquire, to present oral argument pro hac vice behalf of petitioner GRANTED.
21	Dec 24 1984		Record filed.
22	Jan 9 1985		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

83-1329

Office - Supreme Court, U.S.
FILED
FEB 7 1984
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CLERK

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

JOHN REAL,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A.H. SMITH
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QUESTIONS PRESENTED

I. Does the United States Constitution require a prison disciplinary board to state in the administrative record its reasons for denying an inmate's request to call witnesses at his disciplinary hearing?

II. Is 103 Code Mass. Regs. § 430.14 (1978) unconstitutional because it does not require a prison disciplinary board to state in the administrative record its reasons for denying an inmate's request to call witnesses at his disciplinary hearing?

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OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, John Real v. Superintendent, Massachusetts Correctional Institution, Walpole, is reported at 390 Mass. 399, 456 N.E.2d 1111 (Mass. 1983). (App. A).

The order of the Single Justice of the Massachusetts Appeals Court is unreported. John Real v. Superintendent, M.C.I., Walpole, No. 82-0235 Civ. (Mass. App. Ct., August 4, 1982). (App. B).

The trial judge's Findings, Rulings and Order on Petitioner's Writ of Habeas Corpus are unreported. John Real v. Joseph Ponte, Superintendent, Massachusetts Correctional Institution, Walpole, Civil No. 136228, (Norfolk, SS. June 16, 1982). (App. C).

JURISDICTION

The decision of the Massachusetts Supreme Judicial Court was issued November 10, 1983, affirming in part and reversing in part the judgment for the plaintiff dated June 16, 1982. The

jurisdiction of this Court is claimed under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Constitutional provision involved in this case is the following clause of the Fourteenth Amendment to the Constitution of the United States:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

This case also involves 103 Code Mass. Regs. §430.14 (1978), the text of which has been fully set forth in Appendix D.

STATEMENT OF THE CASE

On December 31, 1981, John Real, an inmate at the Massachusetts Correctional Institution ("M.C.I."), Walpole,received notice of a prison disciplinary

hearing. Real was charged with 1) disobeying an order, 2) conduct which disrupts or interferes with the security or orderly running of the institution, and 3) participating in or encouraging a riot, work stoppage, hostage taking, or unauthorized group demonstration. Upon receipt of the notice, Real requested representation by counsel. He also requested that the correction officer who had reported the disciplinary violations be present at the hearing. Finally, he requested the presence of two inmates as witnesses in his defense.

Real, represented by counsel, appeared before the prison disciplinary board on February 10, 1982, and pleaded not guilty. The board denied Real's request for the two inmate witnesses.

Real was found guilty of the charged disciplinary offenses. The board imposed sanctions of thirty days'isolation, forfeiture of 200 days of "good time," and recommended that Real be transferred to the Departmental Segregation Unit ("D.S.U.", also known as "Block 10", at M.C.I., Walpole). On appeal to the superintendent, the recommended sanctions were reduced to twenty-five days of isolation and forfeiture of 150 days of good time credit. The superintendent affirmed the recommendation of transfer to the D.S.U. Real was then placed in administrative segregation in the Institutional Disciplinary Unit ("I.D.U.", or "Block 9"), to await

action by the D.S.U. board regarding his recommended transfer to D.S.U.

Real brought two pro se petitions for writ of habeas corpus against the superintendent. In one petition, Real sought release from the I.D.U. on the grounds that his confinement there was unconstitutional, and that the conditions of confinement in the I.D.U. violated the First and Eighth Amendments to the United States Constitution. In the second petition, Real sought removal of the sanctions imposed by the disciplinary board on the ground that the board's denial of his request for witnesses violated his due process rights under the constitution.

Both actions were heard together on the merits before a judge of the Superior Court. The judge treated both petitions as complaints for declaratory judgment. The judge held that the disciplinary board's denial of Real's request for inmate witnesses violated Real's constitutional right to due process. He ordered Real's release from the I.D.U. back to general population, and reinstatement of the lost good time.1/

1/ As a result of ministerial error, the original judgment of the Superior Court in No. 136228 failed to order reinstatement of the lost good time. A revised judgment was subsequently entered ordering reinstatement of the good time in accordance with the Findings and Rulings in No. 136228. The revised judgment was stayed by the Superior Court pending the outcome of the appeal in the Supreme Judicial Court. The Massachusetts Appeals Court

(footnote continued)

On appeal, the Supreme Judicial Court held that the Due Process Clause of the United States Constitution requires that there be some support in the administrative record to justify a disciplinary board's decision not to call witnesses requested by an inmate at his disciplinary hearing. The court held that because the Massachusetts prison regulation, 103 Code Mass. Regs. § 430.14 (1978), does not require the disciplinary board to provide some explanation for denying a witness in the administrative record, that regulation is unconstitutional. And, because the administrative record of Real's

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(footnote continued)

granted a stay from the judgment ordering Real's return to the general prison population pending appeal.

disciplinary hearing did not contain such an explanation, Real was denied due process. The court affirmed the order returning Real's good time credits. However, holding that Real's transfer to the I.D.U. did not implicate any constitutionally protected liberty interest, the court reversed that portion of the Superior Court order which ordered Real's release to the general prison population.

On December 2, 1983, the court allowed the superintendent's Motion To Stay Rescript pending resolution of this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The decision of the Massachusetts Supreme Judicial Court is in direct conflict with the decision of the United States Court of Appeals for the First

Circuit in Murney v. Carver, 602 F.2d 993 (1st Cir. 1979). Relying on the principles set forth by this Court in Wolff v. McDonnell, 418 U.S. 539, 566 (1974), the First Circuit has held that due process does not require a prison disciplinary board to state its reason for refusing to call a witness requested by an inmate at his disciplinary hearing. Murney v. Carver, 602 F.2d at 995-96. Citing the dissents in both Murney and Wolff, the Massachusetts Supreme Judicial Court rejected the First Circuit's ruling and held that due process requires a prison disciplinary board to provide some explanation in the administrative record for denying an inmate's request to call witnesses.

Real v. Superintendent, Massachusetts Correctional Institution, Walpole, 390 Mass. at 406-407, 456 N.E.2d at 1116. On this ground alone, the Supreme Judicial Court held 103 Code Mass. Regs. § 430.14 (1978), which does not require a statement of reasons for denying witnesses, to be unconstitutional.

II. The writ should also be granted to resolve a question of constitutional law which has caused conflict between the federal courts of appeals. The First, Fifth and Sixth Circuits have held that the constitution does not require prison disciplinary boards to state their reasons for denying an inmate's request to call witnesses at his disciplinary hearing. Murney v. Carver, 602 F.2d at

995-96; Smith v. Rabalais, 659 F.2d 539, 543-44 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); Walker v. Hughes, 558 F.2d 1247, 1259 (6th Cir. 1977). The Fourth Circuit has also indicated that it may follow this view. Ward v. Johnson, 690 F.2d 1098, 1112-1113 (4th Cir. 1982). The Seventh Circuit has, however, held to the contrary. Hayes v. Thompson, 637 F.2d 483, 488 (7th Cir. 1980). In adopting a holding in conflict with that of the First Circuit, the Supreme Judicial Court followed the holding of the Seventh Circuit. Real v. Superintendent, Massachusetts Correctional Institution, Walpole, 390 Mass. at 406-407, 456 N.E.2d at 1116.

III. The decision of the Supreme Judicial Court expands the procedural due process rights of prison inmates at prison disciplinary hearings beyond those which this Court has heretofore required.

ARGUMENT

I. The Constitution Does Not Require Prison Officials To Provide An Explanation In The Administrative Record For Denying An Inmate's Request For Witnesses At His Disciplinary Hearing.

The basic due process requisites of a prison disciplinary hearing were set forth in Wolff v. McDonnell, 418 U.S. 539 (1974). There, this Court set forth only a limited right of an inmate to call witnesses and present documentary evidence in his defense. Noting the

sensitive nature of the prison environment, the Court emphasized that a high degree of discretion should be left to prison officials so they can exercise the necessary control over disciplinary proceedings. The Court expressly omitted any requirement that officials state their reason for denying an inmate's request for witnesses. Wolff v. McDonnell, 418 U.S. at 566-67.

In Baxter v. Palmigiano, 425 U.S. 308 (1976), the Court struck down a Ninth Circuit requirement that an inmate at a disciplinary hearing must be given written reasons for a denial of the privilege to confront and cross-examine witnesses. 425 U.S. at 312, 322-23. In so doing, the Court noted that due process did not even require a statement

of reasons when a disciplinary committee denies an inmate the limited right to call witnesses in his defense. 425 U.S. at 322-23.

In light of both the language and policy considerations enunciated in Wolff, the First Circuit has held that there is no constitutional requirement that a prison disciplinary board state in the administrative record the reasons for denying an inmate's request for witnesses. Hurney v. Carver, 602 F.2d 993, 995-996 (1st Cir. 1979). Accord, Smith v. Rabalais, 659 F.2d 539, 543-44 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); Walker v. Hughes, 558 F.2d 1247, 1259 (6th Cir. 1977). See Pollard v. Baskerville, 481 F. Supp. 1157, 1161

(E.D. Va. 1979), aff'd, 620 F.2d 294 (4th Cir. 1980) (table); Ward v. Johnson, 690 F.2d 1098, 1112-1113 (4th Cir. 1982). Contra, Hayes v. Thompson, 637 F.2d 483, 488 (7th Cir. 1980).

The Supreme Judicial Court rejected both the reasoning and rule of this Court and the First Circuit, and held that a prison disciplinary board is constitutionally required to provide support in the administrative record for denying an inmate's request to call witnesses. Because no such explanation appeared in the administrative record in Real, the Supreme Judicial Court found that Real's disciplinary hearing was constitutionally flawed, and affirmed

the trial judge's order that Real's good time credits be restored. Real v. Superintendent, 390 Mass. at 406-408, 456 N.E.2d at 1116-17.

In so doing, the Supreme Judicial Court has failed to heed this Court's call for great circumspection in the judicial review of prison administration:

> [T]he problems that arise in the day-to-day operations of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and to maintain institutional security .... 'Such considerations are peculiarly within the province and professional

> expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.' [Citations omitted.]

Bell v. Wolfish, 441 U.S. 520, 547-48 (1979) (emphasis added).

II. The Regulations Of the Massachusetts Department Of Correction, 103 Code Mass. Regs. § 430.14 (1978), Do Not Violate The Constitution.

The regulations of the Massachusetts Department of Correction, 103 Code Mass. Regs. § 430.14 (6), provide that an inmate shall be allowed to call witnesses in his defense at a disciplinary hearing when permitting him to do so 'will not be unduly hazardous to institutional safety

or correctional goals.' The regulations further state that factors pertinent to the decision to deny an inmate's request for a witness include, but are not limited to, the relevance, cumulativeness, or necessity of the testimony offered, and the hazards presented by an individual case. (App. D).

These regulations mirror, almost exactly, the constitutional requirements set forth by this Court in Wolff, 418 U.S. at 566. The fact that the regulations do not require the disciplinary board to state an explanation for its denial of witnesses in the administrative record does not render the regulations unconstitutional. See Wolff v. McDonnell, 418 U.S. at

566-67; Baxter v. Palmigiano, 425 U.S. at 322-23; Hurney v. Carver, 602 F.2d at 995-96. The Supreme Judicial Court was in error when it held that the regulations did not pass constitutional muster.

CONCLUSION

Based on the foregoing, the writ of certiorari should issue to review the decision of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

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APPENDIX A

N-3006 S.J.C.

JOHN REAL vs. SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE

LIACOS, J. This is one of four cases decided today[1] involving the constitutionality of procedures at State prison disciplinary hearings. Plaintiff John Real brought two separate pro se petitions for a writ of habeas corpus against the defendant.[2]

1/ See Nelson v. Commissioner of Correction, ante (1983); Lamoureux, v. Superintendent, Mass. Correctional Inst., Walpole, post (1983); Cassesso v. Commissioner of Correction, post (1983). See also Royce v. Commissioner of Correction, post (1983).

2/ All of the court documents submitted by the plaintiff are handwritten and apparently drafted by him. We recognize that "[t]he handwritten pro se document is to be liberally construed. As the

(footnote continued)

The first action sought the plaintiff's release from the Institutional Disciplinary Unit (I.D.U., or Block 9)[3] at the Massachusetts Correctional

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(footnote continued)

[Supreme] Court unanimously held in Haines v. Kerner, 404 U.S. 519 (1972), a pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See Hurney v. Carver, 602 F.2d 993, 995 (1st Cir. 1979). Accordingly, with considerable difficulty, we identify and discuss the issues that seem to us both preserved and substantial.

3/ The Institutional Disciplinary Unit is a "short-term segregation disciplinary unit." Its purpose is the separation of certain individuals from the general prison population by confinement in a specific, designated area under even further limitations and restrictions. See generally G.L. c. 127, § 39. In addition to disciplinary segregation,

(footnote continued)

Institution, Walpole (M.C.I., Walpole), alleging that confinement to the I.D.U. while a prisoner is awaiting action before the Department Segregation Unit Board (D.S.U. Board) pursuant to a disciplinary sanction of reclassification is unconstitutional and

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(footnote continued)

such separate confinement may apply to inmates for administrative reasons. See also Lamoureux v. Superintendent, Mass.Correctional Inst., Walpole, supra. Isolation may be imposed only for disciplinary reasons after a disciplinary hearing. Isolation time may also be served in a locked cell in the segregation unit. See generally G.L. c. 127, § 40. The internal institutional policy makes no distinction for the conditions of separate confinement between those inmates being segregated for disciplinary reasons and those segregated for administrative reasons.

that the conditions of the confinement in the I.D.U. violated the First and Eighth Amendments to the United States Constitution. In the second action, the plaintiff sought the removal of sanctions imposed by the disciplinary board (board) alleging that his constitutional right of due process[4] was violated by the procedures in which the board denied his request for certain witnesses at a disciplinary hearing.

Both actions were heard together on the merits before a judge of the Superior Court on May 25, 1982.[5]

4/ The plaintiff only raised the issue of his due process rights protected by the United States Constitution. We do not now decide, therefore, if prisoners have broader due process rights under our State Constitution.

5/ At the hearing, the trial judge held that the constitutionality of the conditions of confinement in the I.D.U. was not before him.

The trial judge treated both petitions as complaints for declaratory judgment. The judge implicitly found that the reason for the plaintiff's placement in I.D.U. after the hearing was his alleged misconduct. In reviewing the procedures followed at the disciplinary hearing, the judge concluded that the plaintiff's due process rights had been violated by the board's denial of the plaintiff's request for witnesses. Thus, the judge concluded the plaintiff's subsequent confinement to the I.D.U. to be invalid. The trial judge ordered the plaintiff returned to the general prison population. He also ruled the sanction comprising the loss of 150 days of statutory good time credit resulting from the disciplinary hearing to be invalid, and he ordered the respondent to credit the petitioner with the 150 days' good time.

The defendant sought a stay of the judgments pending appeal of both orders. The Appeals Court concluded that only the motion for a stay from the judgment ordering the return of the prisoner to the general prison population to be before it. A stay pending appeal from the order returning the prisoner to the general prison population was granted. We transferred the case here on our own motion.

The defendant argues that the trial judge may not construe a petition for writ of habeas corpus as a complaint for declaratory judgment without proper notice to the adverse party. Agreeing that Wolff v. McDonnell, 418 U.S. 529 (1974), sets the minimum due process procedures for the disciplinary proceeding under Federal law, the

care of the Department of Correction.[5] On December 24, 1981, Correctional Officer Baleyko reported the plaintiff for disciplinary violations at M.C.I., Walpole. Within the same day the plaintiff was locked in his cell, and subsequently transferred to a segregation unit at M.C.I., Norfolk. On December 31, 1981, the

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6/ The plaintiff testified that he is serving a term of three to five years for a conviction of carrying a sawed-off shotgun and that he had been sentenced on June 14, 1979.

While incarcerated at M.C.I., Walpole, for the possession of a sawed-off shotgun, the plaintiff was convicted of manslaughter in the death of another inmate. He received a five-year sentence at M.C.I., Concord, to take effect from and after his conviction for carrying a sawed-off shotgun.

Because of the insufficient record before us, we are not clear whether, if we affirm the trial judge's invalidation of the board's sanction, the plaintiff will have finished his original sentence and will now be serving his second sentence.

defendant also contends that the board did not violate the mandate of Wolff. Finally, the defendant claims that the placement of the plaintiff in the I.D.U. was a purely administrative placement not infringing any liberty interest of the plaintiff.

We conclude that this action properly was treated by the judge as one seeking declaratory relief. We also conclude, since denial of the plaintiff's request for witnesses is so totally without support in the administrative record, that the judge was warranted in finding that the proceedings violated the due process clause of the Fourteenth Amendment to the United States Constitution. The facts are as follows. The plaintiff is an inmate lawfully in the custody and

plaintiff received written notice of a disciplinary hearing scheduled before the disciplinary board. It is unclear whether the plaintiff received an actual copy of the disciplinary report. The judge found, however, that the notice informed the plaintiff that he was charged with disobeying an order in violation of 103 Code Mass. Regs. § 430.22 (1) (1978), with conduct which disrupts or interferes with the security or orderly running of the institution in violation of 103 Code Mass. Regs. § 430.22 (8) (1978), and with participating in or encouraging a riot, work stoppage, hostage taking, or unauthorized group demonstration in violation of 103 Code Mass. Regs. § 430.22 (14) (1978). On receipt of the

notice, the plaintiff requested representation by counsel and requested the presence of the reporting officer and two inmates as witnesses in his defense.

At the hearing before the board on February 10, 1982, the plaintiff appeared with counsel and pleaded not guilty.7/ The board denied the

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7/ At the same hearing the board also heard evidence of a second disciplinary report alleging the possession of a weapon in violation of 103 Code Mass. Regs. § 430.22 (15) (1978), the unauthorized possession of another's property in violation of 103 Code Mass. Regs. § 430.22 (23) (1978), and stealing in violation of 103 Code Mass. Regs. 430.22 (26) (1978). From the record, it is unclear whether this second report was related to the disciplinary report challenged in this case. The disposition of these charges is also unclear. The trial judge found that the plaintiff had received no notice of the second report. The plaintiff, however,

(footnote continued)

plaintiff's request for the two inmate witnesses. Real was found guilty of the offenses alleged in the disciplinary report. The board imposed sanctions of thirty days' isolation, forfeiture of 200 days of good time, and a referral to the Department Segregation Unit (D.S.U., also known as Block 10, at M.C.I., Walpole).

The plaintiff appealed the guilty finding and the recommended sanctions to the superintendent, who reduced the

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(footnote continued)

does not appear to be challenging the second report.

There is also a prior disciplinary hearing in 1980 to which the plaintiff referred in some confusion at the hearing before the trial judge.

sanctions to twenty-five days of isolation and forfeiture of 150 days of good time credit.[8/] The superintendent also affirmed the recommendation of transfer to the D.S.U. The hearing was held at M.C.I., Walpole. Real was brought from M.C.I., Norfolk, to M.C.I., Walpole, for the hearing. Immediately after the hearing, he was placed in the I.D.U. at M.C.I., Walpole, where he presently remains.

I. Declaratory relief. Relying on Pina v. Superintendent, Mass. Correctional Inst., Walpole, 376 Mass. 659 (1978), the trial judge chose to treat the plaintiff's petitions for habeas corpus as a claim for declaratory

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8/ The trial judge did not address his judgments to the isolation time sanction. It appears that the plaintiff has already completed the isolation time.

judgment. Pina, supra at 666. See Nelson v. Commissioner of Correction, ante, . (1983); Hennessy v. Superintendent, Mass. Correctional Inst., Framingham, 386 Mass. 848, 850-852 (1982). The defendant states that, while the judge may construe a petition for writ of habeas corpus as a complaint for declaratory judgment, such discretionary power may be exercised only with proper notice to the adverse party to prevent a manifest injustice.

The defendant makes no argument, and cites no authority to support his statement. This portion of the defendant's brief fails to qualify as "argument" within rule 16 of the Massachusetts Rules of Appellate Procedure, as amended, Mass. (1982). Accordingly, we do not address

the defendant's contention. The plaintiff, challenging the constitutionality of the regulations pertaining to the right to call witnesses as set forth in 103 Code Mass. Regs. § 430.14 (6) (1978), has properly stated a claim for declaratory relief.[9] See Nelson v. Commissioner of Correction, supra at ; Consolidated Cigar Corp. v. Department of Pub. Health, 372 Mass. 844, 845, 850-851 (1977); Wolf v. Commissioner of Public Welfare, 367 Mass. 293, 296-297 (1975).

II. Federal due process requirements. Where the decision of a disciplinary hearing subjects an inmate

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9/ We also address the issue of the particular adjudication for the reasons set forth in Nelson v. Commissioner of Correction, supra at n.12.

to a loss of good time credits, he is entitled to the minimal due process requirements mandated in Wolff v. McDonnell, supra. See Nelson v. Commissioner of Correction, supra at . Among these requirements is the right "to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." Wolff, supra at 566.

In recognizing this right, however, the United States Supreme Court acknowledged that "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits." Wolff, supra at 566. The Supreme Court held that officials may refuse to call witnesses whom they

determine are irrelevant, unnecessary, or hazardous, and it went on to say that it would be "useful," although not required, for reasons for denial to be stated. Wolff, supra. In a later case, the Supreme Court indicated that it was referring in Wolff to a written statement of reasons but that such a written statement was not required. Baxter v. Palmigiano, 425 U.S. 308, 322 (1976). Left unresolved is the question whether the Federal due process requirements impose a duty on the board to explain, in any fashion, at the hearing or later, why witnesses were not allowed to testify. It is this question that the facts of the instant case present to us. No such explanation is required by 103 Code Mass. Regs. § 430.14 (1978), reprinted in the margin,

involving witnesses requested by the inmate for disciplinary hearings.[10]

10/ The relevant portions of the State regulations are as follows:

"430.14: Fact Finding Aspects of Hearing Before Disciplinary Board.

. . . .

"(4) If the inmate requests the presence of the reporting officer in accordance with the provisions of 103 CMR 430.11 and/or 430.12, the reporting officer shall attend the hearing except when the chairman determines in writing that the reporting officer is unavailable for prolonged period of time as a result of illness or other good cause. Such written determination shall be reviewed by the superintendent prior to the commencement of the hearing. The superintendent may approve the determination or disapprove it and require rescheduling of the hearing at a time when the reporting officer will be available. The chairman in his discretion may also require the presence of the reporting officer on his own motion.

(footnote continued)

If we conclude that due process requires

(footnote continued)

"(5) The inmate shall be allowed but shall not be compelled to make an oral statement or to present a written statement in his own defense or in mitigation of punishment.

"(6) The inmate shall be allowed to question the reporting officer, to question other witnesses, to call witnesses in his defense, or to present other evidence, when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. The factors that the chairman may consider when ruling on an inmate's questioning of witnesses, offer of other evidence, or request to call witnesses shall include, but shall not be limited to, the following:

(a) Relevance
(b) Cumulative testimony
(c) Necessity
(d) Hazards presented by an individual case.

"The chairman, in his discretion, may call witnesses on his own motion, and the chairman or [illegible] board members may question witnesses or the reporting officer on their own motion.

(footnote continued)

some explanation for the denial of witnesses, the State regulations will not be constitutional.

The right to call witnesses is limited under federal law. See Wolff, supra at 566. See also Baxter, supra at 321. Broad discretion is given to prison administrators out of necessity because "[t]he operation of a correctional institution is at best an

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(footnote continued)

"(7) The inmate shall be allowed to present relevant, nonaccumulative documentary evidence in his defense."

Only the denial of a request for the presence of the reporting officer must be explained and placed in writing. See 103 Code Mass. Regs. § 430.14 (4) (1978).

extraordinarily difficult undertaking." Wolff, supra at 566. Such broad discretion, however, is not limitless. See Cardaropoli v. Norton, 523 F.2d 990, 998 (2d Cir. 1975). The purpose of the due process clause of the Fourteenth Amendment is to protect the individual against arbitrary governmental action. Wolff, supra at 558. Clearly, "[d]ue process does not permit the automatic exclusion of the right to call witnesses." Hayes v. Walker, 555 F.2d 625, 629 (7th Cir.), cert. denied, 434 U.S. 959 (1977).

The right to call witnesses is an important right to an accused "who obviously faces a severe credibility problem when trying to disprove the charges of a prison guard." Wolff, supra at 583 (Marshall, J., dissenting,

with whom Brennan, J., joins). To hold that the board need not state its reasons for refusal would render meaningless the prisoner's limited right to call witnesses. See Hurney v. Carver, 602 F.2d 993, 996 (1st Cir. 1979) (Bownes, J., dissenting); Hayes, supra at 630. We find persuasive the requirement of the United States Court of Appeals for the Seventh Circuit that there must be some support in the administrative record to justify a decision not to call witnesses, in order to ensure that the hearing is not a charade. See Hayes v. Thompson, 637 F.2d 483, 487-489 (7th Cir. 1980).

On the record presented before us, there is no explanation for the denial of the inmate witnesses requested by Real. The administrative record is

barren. We conclude that the failure of the regulations to require some support in the record for the denial of the plaintiff's witnesses abridged his Federal due process rights. The trial judge properly concluded that the sanctions resulting from a constitutionally flawed disciplinary hearing were invalid, and correctly ordered the return of Real's good time credits.

The defendant, however, contends that the return of Real to the general prison population was incorrect because the plaintiff's placement in the I.D.U. was made for administrative reasons. We recognize that the United States Supreme Court has held that "administrative segregation is the sort of confinement

that inmates should reasonably anticipate receiving at some point in their incarceration" and it does not involve an interest independently protected by the due process clause. Hewitt v. Helms, 103 S. Ct. 864, 870 (1983). See also Lamoureux v. Superintendent, Mass. Correctional Inst., Walpole, post (1983). We do not reach the question whether the statutes and regulations of the Commonwealth created a protected liberty interest respecting administrative segregation because the trial judge implicitly found that the segregation was for disciplinary reasons after the investigation had been completed and

determined by the hearing.[11]

11/ Even if we were inclined to construe our State regulations and statutes governing intraprison transfer for nonpunitive segregation to involve a State-created liberty interest because of "explicitly mandatory language in connection with requiring specific substantive predicates," that is similar to the Pennsylvania regulations, found by the United States Supreme Court to create a State liberty interest, the parties have not argued their contentions based on that theory. See Hewitt v. Helms, 103 S. Ct. 864, 871 (1983); Mass. R. A. P. 16 (a), as amended, 367 Mass. 921 (1975). Moreover, we note the due process requirements applicable to administrative segregation are limited. The Hewitt court has stated, "We think an informal nonadversary evidentiary review sufficient . . .. an inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose." Hewitt v. Helms, supra at 874.

As we have noted today, regardless of the logic of the trial judge's ruling, even if transfers are the direct consequence of a tainted disciplinary hearing, they do not implicate or infringe a State-created liberty interest protected by the due process clause of the Fourteenth Amendment. See Nelson v. Commissioner of Correction, supra at . The trial judge improperly ordered the return of the plaintiff to the general prison population.

In his findings and rulings on the plaintiff's petition for a writ of habeas corpus, the trial judge states: "I treat the petitioner's writ of habeas corpus as a claim for declaratory relief." As such, he should have declared the rights of the parties and

ordered relief. Here, however, the judge ordered a judgment be entered requiring the return of the plaintiff to the general prison population. Subsequently, two judgments were entered, one ordering the restoration of the plaintiff's good time credits and the other ordering his release to the general prison population. To the extent that the form of relief is wrong, we reverse the judgments and remand the case for an entry of judgment declaring the rights of the plaintiff and ordering relief consistent with the principles set forth in our opinion. The defendant is to be given, on request, the right to convene a disciplinary board to conduct a new hearing on the same terms and

conditions we describe in Nelson v. Commissioner of Correction, supra at n.21.

So ordered.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NO. 82-0235 Civ.

JOHN REAL

vs.

SUPERINTENDENT, M.C.I. WALPOLE

ORDER

This is an application by the Superintendent for a stay of a judgment entered in the underlying Superior Court case, Norfolk 136228, from which judgment the Superintendent has appealed. Following the trial judge's denial of a stay, I ordered a stay of the judgment pending hearing on the motion for a stay. The hearing was held July 8, 1982.

The underlying case began as a petition for a writ of habeas corpus,

and the trial judge, ruling that habeas corpus did not lie, treated it as one for declaratory relief. The judge ruled that the petitioner Real was denied due process at a disciplinary board hearing and that the sanctions resulting from the hearing (as modified by a subsequent administrative appeal) -- loss of 150 days of good time, 25 days isolation, and a recommendation of reclassification consideration -- were invalid.1/

1/ There was a separate petition, Norfolk 136442 relating to the loss of good time. The petitions were heard together, and the trial judge entered a judgment in 136442 ordering restoration of the good time. This came to my attention at the hearing and counsel for the Superintendent indicated that he wished a stay of the judgment in 136442 as well as in 136228. This I deny without prejudice, partly because the motion and the papers before me relate

(footnote continued)

The judgment appealed from does not concern those sanctions, however. Rather, it concerns the placement of Mr. Real in the so-called IDU, or short-term segregation unit at Walpole, otherwise known as Block 9. That placement, according to the arguments before me, does not depend on a finding of misconduct, but is regarded as purely administrative placement which can be ordered for any reason relating to the

---

(footnote continued)

only to 136228, and partly because it has not been shown that a stay of the good time restoration judgment will have any practical impact during the appeal period. If the penal status of Mr. Real is such that a stay will have a practical effect during the appeal period, the Superintendent may, of course, file a motion for a stay of that judgment, which will be considered on the merits at that time.

proper running of the prison. Nevertheless, the trial judge may well be right in finding, as he implicitly did, that the reason for the placement in this case was the misconduct alleged.

The probabilities-hardship equation in this case seems to me to indicate that the judgment should be stayed pending appeal. See Meachum v. Fano, 427 U.S. 215 (1976); Lombardo v. Meachum, 548 F.2d 13 (1977) Four Certain Unnamed Inmates of M.C.I. Walpole v. Hall, 550 F.2d 1291 (1977); Daigle v. Hall, 564 F.2d 884 (1977) (all three being 1st Cir.). It is so ordered. The appeals both in this case and in 136442 (see note 1) should be treated as

criminal appeals for purposes of scheduling argument.

By the Court (Armstrong, J.)

/s/

Assistant Clerk

Entered: August 4, 1982.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
CIVIL NO. 136228

JOHN BEAL,
Petitioner

V.

JOSEPH POMTE, SUPERINTENDENT
MASSACHUSETTS CORRECTIONAL
INSTITUTION, WALPOLE
Respondent

FINDINGS, RULINGS AND ORDER
ON PETITIONER'S WRIT
OF HABEAS CORPUS

The petitioner, John Beal, in the above-captioned case has brought a petition for writ of habeas corpus requesting the court to remove sanctions imposed by the Disciplinary Board (Board) and return him to the general population at the Massachusetts

Correctional Institution at Walpole (MCI Walpole). The petitioner contends that the sanctions imposed by the Board of thirty days isolation, 200 days loss of good time and recommendation of reclassification by the Department Segregation Unit (DSU) violate his constitutional right to due process.

Findings

The hearing on this matter took place on May 25, 1982. At the hearing, the petitioner proceeded pro se. Based on the evidence presented, I make the following findings of fact:

1. On December 24, 1981, the petitioner was locked in his cell, subsequently transferred to Block 10, the Department Segregation Unit (DSU),

and then to Massachusetts Correctional Institution at Norfolk (MCI Norfolk).

2. On December 31, 1981, the petitioner received written notice of the scheduled hearing before the Board. The notice informed him of the alleged offenses, i.e. disobeying prison personnel, acting disruptively, and participating in or encouraging a work stoppage, hostage taking, or unauthorized group demonstration.

3. The petitioner appeared with counsel at the February 10, 1982 hearing and made a plea of not guilty.

4. At the hearing, the Board also heard evidence on a second disciplinary report (possession of contraband) of which the petitioner had not received notice.

5. The Board denied the petitioner's request to call two particular witnesses, inmate Robert Thayer and inmate Dale Latoille.

6. Based on the evidence presented, the Board found the petitioner guilty of the offenses charged and imposed sanctions of thirty days isolation, 200 days loss of good time, and recommendation of reclassification by the DSB.

7. The petitioner appealed the Board's findings and sanctions to the Superintendent, Joseph Ponte (Ponte), who reduced the sanctions to twenty-five days isolation, 150 days loss of good time, and recommendation of reclassification by DSB.

8. Presently, the petitioner is in Block 9, the Institutional Disciplinary Unit (IDU).1/

Rulings

1. Writ of Habeas Corpus.

A petition for a writ of habeas corpus is a perscribed procedure to challenge the execution of a sentence.

1/ IDU is the short-term segregation disciplinary unit. Assignment to IDU is not considered reclassification.

Pina v. Superintendent, Massachusetts Correctional Institution, Walpole, 376 Mass. 659, 664 (1978). See G.L. c. 248, § 1 (writ by right); G.L. c. 248, § 25 (writ by discretion of court). A writ of habeas corpus may issue for unlawful imprisonment. Beaton, petitioner, 354 Mass. 670, 671 (1968). The petitioner herein does not request immediate release from MCI Walpole. Rather, the petitioner seeks to be returned to the general population at MCI Walpole. Notwithstanding the petitioner's failure to state a claim for a writ of habeas corpus, a judge may construe such a petition as a claim for declaratory relief. Pina v. Superintendent, Massachusetts Correctional Institution,

Walpole, supra at 663-666. Wherefore, I treat the petitioner's writ of habeas corpus as a claim for declaratory relief. 2. "The touchstone of due process is protection against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). Where a state statutorily creates "liberty interests," e.g., freedom from isolation and the right to good-time credits, which may be forfeited only for serious misbehavior, due process rights come into play to insure that the state created "liberty interests" are not arbitrarily abrogated. Id. at 557. Cf. Kinney, petitioner, 5 Mass. App. Ct. 456, 462 (1977) (due process applies as provided by Fourteenth Amendment). Massachusetts

provides a statutory right to good-time credits which a prisoner may lose if he violates any rule of his place of confinement. G.L. c. 127, § 129. Also a prisoner has an expectation not to be isolated except for the enforcement of discipline. Id. § 40. Thus the minimal due process requirements set forth in Wolff are applicable herein, namely: (1) an advanced written notice of the alleged violation; (2) a written statement by the factfinder as to the evidence relied on and reasons for the disciplinary action; and (3) the right to call witnesses and present evidence unless permitting the prisoner to do so would jeopardize the institutional safety or correctional goals. Wolff v.

McDonnell, supra at 563-566. See 103 Mass. Code Reg. §§ 430.11, 430.14.

The petitioner received advance notice of the hearing. See 103 Mass. Code Reg. § 430.11 (notice to prisoner of hearing). However, not all offenses charged were listed therein. The record is unclear whether the petitioner received a written statement from the Board outlining the evidence "relied upon in reaching the guilty finding; a statement of the reasons for the sanctions imposed; and a notice of the right of appeal." Id. § 430.17. Regardless, the third requirement is dispositive of the case. [5] The Board denied the petitioner's request to call witnesses. Although a prisoner does not

have an unlimited right to call witnesses and present documentary evidence, a denial must not be arbitrary. Only where the calling of a witness may be "unduly hazardous to the institutional safety or the correctional goals" may such a request be denied. Wolff v. McDonnell, supra at 566; 103 Mass. Code Reg. § 430.14(6). No evidence was presented by respondent indicating the reason why the petitioner's request to call two inmates as witnesses in his defense was denied. Thus I find the petitioner's due process right to call witnesses and present evidence was arbitrarily denied by the Board. Accordingly, I hold that the Board violated the petitioner's

due process rights in imposing sanctions of thirty days isolation, 200 days loss of good time credits, and recommendation of reclassification by DSB.

5. The petitioner also claims that the transfer to a segregation unit, Block 9 IDC, after the Board's hearing violates his due process rights. Contrary to the petitioner's claim, there is no constitutional right to be free from intra-prison or inter-prison transfer within the same system. Lombardo v. Meachum, 548 F.2d 13, 15 (1977). Cf. Four Certain Unnamed Inmates of Massachusetts Correctional Institution at Walpole, Massachusetts v. Hall, 550 F.2d 1291, 1292 (1st Cir. 1977) (no Massachusetts statute creates "liberty

interest" to be free from reclassifications). Indeed, a state statute may grant a "liberty interest" in freedom from transfers but Massachusetts has no such statute. Four Certain Unnamed Inmates of Massachusetts Correctional Institution at Walpole, Massachusetts v. Hall, supra at 1292. Rather, the commissioner has the power to authorize the transfer of prisoners to any segregation unit within any correctional system of the Commonwealth. G.L. c. 127, § 39. Cf. Four Certain Unnamed Inmates of Massachusetts Correctional Institution at Walpole, Massachusetts v. Hall, supra at 1292 (prison regulations concerning reclassification do not impose due

process rights on decision to transfer inmates). But see Vitek v. Jones, 100 S. Ct. 1254, 1264 (1980) (transfer to mental hospital has stigmatizing consequences causing due process rights to attach).

Because the petitioner's due process rights were denied at the hearing, i.e., denied right to call witnesses, I find that the subsequent segregation of the petitioner in Block 9 IDC must cease.

Order

Wherefore, it is ordered that judgment enter ordering the respondent forte to return the petitioner to the

general prison population.

/S/

Joseph S. Mitchell, Jr.
Justice of the Superior Court

Entered: June 16, 1982

A TRUE COPY

Attest /S/

Deputy Assistant Clerk

APPENDIX 2

103 Code Mass. Regs. § 430.14:
Fact Finding Aspects of Hearing Before Disciplinary Board

(1) Before the chairman reads the charge at a hearing regarding a disciplinary offense which has been or may be referred to the district attorney for prosecution, he shall advise the inmate that he has a right to remain silent and that anything he says during the hearing may be used against him in any subsequent criminal proceedings.

(2) At the beginning of the hearing before a disciplinary board the chairman shall read the charges to the inmate and after giving any warning required by 103 CMR 430.14(1) ask the inmate if he wishes to admit or deny the charges. If the inmate admits the charges the board may immediately consider the evidence in mitigation of guilt and the sanction.

(3) If the inmate does not admit the charges the chairman shall conduct a fact finding hearing at which the disciplinary board may consider written, oral and physical evidence. All evidence considered by the disciplinary board shall be presented in the presence of the inmate except informant information which may be presented in accordance with the provisions of 103 CMR 430.15.

(4) If the inmate requests the presence of the reporting officer in accordance with the provisions of 103 CMR 430.11 and/or 430.12, the reporting officer shall attend the hearing except when the chairman

determines in writing that the reporting officer is unavailable for prolonged period of time as a result of illness or other good cause. Such written determination shall be reviewed by the superintendent prior to the commencement of the hearing. The superintendent may approve the determination or disapprove it and require rescheduling of the hearing at a time when the reporting officer will be available. The chairman in his discretion may also require the presence of the reporting officer on his own motion.

(5) The inmate shall be allowed but shall not be compelled to make an oral statement or to present a written statement in his own defense or in mitigation of punishment.

(6) The inmate shall be allowed to question the reporting officer, to question other witnesses, to call witnesses in his defense, or to present other evidence, when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. The factors that the chairman may consider when ruling on an inmate's questioning of witnesses, offer of other evidence, or request to call witnesses shall include, but shall not be limited to, the following:

(a) Relevance

(b) Cumulative testimony

(c) Necessity

(d) Hazards presented by an individual case.

The chairman, in his discretion, may call witnesses on his own motion, and the chairman or the board members may question witnesses or the reporting officer on their own motion.

(7) The inmate shall be allowed to present relevant, non-cumulative documentary evidence in his defense.

PETITIONER'S

BRIEF

FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1329

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

JOSEPH PONTE, SUPERINTENDENT,
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INSTITUTION, WALPOLE,
Petitioner,

V.

JOHN REAL,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED

I. Whether the Constitution of the United States requires a prison disciplinary board to state in the administrative record its reasons for denying an inmate's request to call witnesses at his disciplinary hearing?

II. Whether 103 Code Mass. Regs. §430.14 (1978) is unconstitutional because it does not require a prison disciplinary board to state in the administrative record its reasons for denying an inmate's request to call witnesses at his disciplinary hearing?

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NO. 83-1329

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

JOSEPH PONTE, SUPERINTENDENT,
MASSACHUSETTS CORRECTIONAL
INSTITUTION, WALPOLE,
Petitioner,

V.

JOHN REAL,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, John Real v. Superintendent, Massachusetts Correctional Institution, Walpole, is

reported at 390 Mass. 399, 456 N.E.2d 1111 (Mass. 1983), and is reproduced as Appendix A to the petition for writ of certiorari. The opinion of the Massachusetts Superior Court is unreported. John Beal v. Superintendent, Massachusetts Correctional Institution, Walpole, Civil No. 136228 (Norfolk, SS. June 16, 1982). It is reproduced as Appendix C to the petition for writ of certiorari.

JURISDICTION

The decision of the Massachusetts Supreme Judicial Court was issued November 10, 1983. Issuance of the rescript was stayed, on motion, pending the filing of a petition for writ of certiorari. The petition for writ of

certiorari was filed on February 7, 1984, and was granted on October 1, 1984. The jurisdiction of this Court is claimed under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Constitutional provision involved in this case is the following clause of the Fourteenth Amendment to the Constitution of the United States:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

This case also involves 103 Code Mass. Regs. §430.14 (1978), the text of which has been fully set forth as Appendix D to the petition for writ of certiorari.

STATEMENT OF THE CASE

Prior Proceedings

The respondent, John Real, was an inmate in the care and custody of the Massachusetts Department of Correction.[1/] On April 8, 1982, Real

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1/ On October 31, 1984, the respondent was paroled to the federal authorities pursuant to a detainer warrant lodged by the Immigration and Naturalization Service. In addition to general conditions of parole, respondent is to be supervised for drugs and liquor abstinence.

Petitioner suggests that the conditional release of respondent Real does not render the instant controversy moot. In United States v. Campos-Serrano, 404 U.S. 293 (1971), the respondent's sentence was suspended and he was placed on probation for three years "on the condition that he return to Mexico and not return to the United States illegally." The Court held that although the respondent was now out of the country, the case was not rendered moot, for he was still under sentence and subject to conditions of probation. 404 U.S. at 294, n.2. In the instant

(footnote continued)

filed a pro se petition for writ of habeas corpus, in Massachusetts Superior Court, against Joseph Ponte, Superintendent of the Massachusetts

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(footnote continued)

case respondent has been released on parole, not probation. However, this Court has similarly held that release on parole, where release is conditional and subject to restraints, does not render moot a case involving challenges to procedures followed by petitioners in granting parole. Jago v. Van Curen, 454 U.S. 14, 21, n.3 (1981). Contrast, Weinstein v. Bradford, 423 U.S. 147 (1975) (complete release from supervision renders case moot). Respondent's ultimate release date is July 18, 1987. Both petitioner and respondent therefore retain a live interest in the restoration or withholding of 150 days of good time credits which will affect the ultimate release date. Compare, Manning v. Superintendent, Massachusetts Correctional Institute, Norfolk, 372 Mass. 387, 361 N.E.2d 1299 (Mass. 1977). Moreover, violation of the conditions of parole could result in the return of respondent to the custody of petitioner.

Correctional Institution (M.C.I.), Walpole. Real filed an amended petition on May 5, 1982. The petition challenged, inter alia, disciplinary procedures at M.C.I., Walpole. J.A. 3,8.

The petition was heard on the merits before a judge of the superior court on May 25, 1982.[2/] The judge treated the petition as a complaint for declaratory judgment. In his memorandum of decision, the judge held that a prison disciplinary board's denial of Real's request for inmate witnesses at his disciplinary hearing violated Real's

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2/ A second petition, numbered 136442, was also heard on May 25, 1982. Separate Findings and Rulings were entered by the judge in that matter, and are not at issue in this case.

constitutional right to due process. The court ordered reinstatement of good time which had been lost by Real as a result of the disciplinary proceedings. App. C to Pet.[3/]

On appeal, the Supreme Judicial Court held that the Due Process Clause of the United States Constitution required that there be some support in the administrative record to justify a disciplinary board's decision not to

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3/ As a result of ministerial error, the original judgment of the superior court in No. 136228 failed to order reinstatement of the lost good time. A revised judgment was subsequently entered ordering reinstatement of the good time in accordance with the Findings and Rulings in No. 136228. The revised judgment was stayed by the superior court pending the outcome of the appeal in the Supreme Judicial Court. J.A. 46-49.

call witnesses requested by an inmate at his disciplinary hearing. The court held that because the Massachusetts prison regulation, 103 Code Mass. Regs. §430.14 (1978), does not require the disciplinary board to provide some explanation for denying a witness in the administrative record, that regulation was unconstitutional. And, because the administrative record of Real's disciplinary hearing did not contain such an explanation, Real was denied due process. The court affirmed the order returning Real's good time credits. App. A to Pet.

Statement of Facts

On December 24, 1981, Correctional Officer John Baleyko reported Real for

disciplinary violations at M.C.I., Walpole. The disciplinary report, numbered 81-4065, stated that while Baleyko was trying to stop an inmate attack on another officer, a group of inmates, including Real, began to enter the area from the "shop." Baleyko told the inmates to stay in the shop and return to their jobs. Although the other inmates obeyed Baleyko's order, Real entered the area of the attack. Baleyko twice again told Real to leave before additional officers, responding to an alarm, came to Baleyko's aid. Baleyko then asked one of the responding officers to lock Real in his room. J.A. 13.

Real was charged with the following disciplinary offenses: 1) disobeying an order, in violation of 103 Code Mass. Regs. §430.22(1) (1978); 2) conduct which disrupts or interferes with the security or orderly running of the institution, in violation of 103 Code Mass. Regs. §430.22(8) (1978); and 3) participating in or encouraging a riot, work stoppage, hostage taking, or unauthorized group demonstration, in violation of 103 Code Mass. Regs. §430.22(14) (1978). J.A. 13.

On December 31, 1981, Real received a written notice informing him of the disciplinary charges and of a disciplinary hearing scheduled before the disciplinary board. On receipt of

the notice, Real requested representation by law student counsel. He also requested that Officer Baleyko be present at the hearing. Finally, he requested the presence of two inmates in his defense. J.A. 18.4/

Real, represented by a law student, appeared before the prison disciplinary board on February 10, 1982, and pleaded not guilty. Officer Baleyko was present and testified at the hearing, but the board denied Real's request for the two inmate witnesses. Real told the

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4/ It appears from the record that Real also requested that the correction officer to whose aid Baleyko had gone be called as a witness. J.A. 18. Real did not pursue any claim with respect to this officer in the courts and that request did not form any part of the basis for the Supreme Judicial Court's ruling.

disciplinary board that he was trying to comply with Baleyko's order but was prevented from doing so when he was "shaken down." Real was found guilty of the charged disciplinary offenses. The board imposed sanctions of thirty days' isolation and recommended forfeiture of 200 days of "good time".[5/] J.A. 14-15. On appeal to the superintendent, the recommended sanctions were reduced to twenty-five days of isolation and

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5/ The disciplinary board also recommended that Real be transferred to the Departmental Segregation Unit ("D.S.U." or "Block 10") at M.C.I., Walpole. While D.S.U. is not among the major sanctions established under 103 Code Mass. Regs. §430.23, such a recommendation, if approved by the superintendent, can trigger separate administrative proceedings which may result in transfer to the D.S.U. See Parenti v. Ponte, 727 F.2d 21 (1st Cir. 1984).

forfeiture of 150 days of good time credit. J.A. 16-17.

SUMMARY OF THE ARGUMENT

Due to the unique conditions of the prison environment, the need of prison administrators to utilize disciplinary procedures to insure security and swift punishment, and the possibility that disciplinary hearings themselves may give rise to disorder and violence within a prison, such hearings stand on a different footing than most other administrative proceedings. Where prison disciplinary hearings may affect a prisoner's constitutionally cognizable liberty interest, the prisoner is entitled only to those facets of procedural due process which are

consistent with the demands of prison security. The prisoner's right to call witnesses is therefore subject to the discretion of prison officials, who may deny an inmate's request for witnesses based on such reasons as irrelevance, lack of necessity, or hazards presented in individual cases. There is no requirement that prison officials state their reasons for denying a witness in the administrative record.

103 Code Mass. Regs. §430.14(6) governs the right of Massachusetts inmates to call witnesses at disciplinary hearings. The regulation, which allows an inmate to call witnesses except when doing so will be hazardous to institutional safety or correctional

goals, sets forth several factors to be considered by a disciplinary board chairman when ruling on an inmate's request for witnesses. The regulation clearly comports with all of the requirements of procedural due process. Nonetheless, the Massachusetts Supreme Judicial Court held that the regulation is unconstitutional because it fails to require prison officials to provide in the record, reasons, explanation, or other support for denying a witness request. This ruling is plainly contrary to the rulings of this Court in Wolff v. McDonnell, 418 U.S. 539 (1974) and Baxter v. Palmigiano, 425 U.S. 308 (1976). Nor is it consistent with this Court's more recent decisions regarding

the constitutional rights of prisoners, which have indicated that, except in the unique circumstance of involuntary psychiatric commitment of prisoners, both procedural and substantive constitutional rights should be strictly limited in the prison setting.

Neither the application of general due process principles nor well established principles of judicial review of administrative action support the expansion of prisoners' rights to include record support for the denial of witnesses at disciplinary hearings. The loss of the liberty interest at stake in disciplinary hearings, statutory good time, does not work any immediate harm to the inmate, and, in the long run, may

work little or no harm. The requirement of record support for denial of witnesses has no direct relationship to the protection of that liberty interest, but is designed merely to protect the procedural right to call witnesses. Nor is the absence of record support a sufficient basis on which to find that prison officials have abused their proper discretion. Finally, an across-the-board requirement of record support for the denial of prisoners' right to call witnesses may easily pose a direct threat to security and, by imposing additional costs in time and resources, an indirect burden on the penological mission as a whole. Given the questionable value of such a

requirement for protecting against a speculative loss to the inmate, these are risks and costs which the constitution should not force prison officials to bear.

ARGUMENT

I. THE MASSACHUSETTS REGULATION GOVERNING AN INMATE'S RIGHT TO CALL WITNESSES AT A PRISON DISCIPLINARY HEARING COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS.

In 1978, the Massachusetts Department of Correction promulgated comprehensive regulations governing prison disciplinary hearings, including the regulation at issue in this case. 103 Code Mass. Regs. §430.14(6), governing a Massachusetts inmate's right to call witnesses in his defense, states in pertinent part:

> The inmate shall be allowed. . . to call witnesses in his defense. . ., when permitting him to do so will not be unduly nazardous to institutional safety or correctional goals. The factors that the chairman may consider when ruling on an inmate's request to call witnesses shall include, but shall not be limited to, the following:
>
> (a) Relevance
> (b) Cumulative Testimony
> (c) Necessity
> (d) Hazards presented by an individual case.6/

6/ 103 Code Mass. Regs. §430.14 is set out in its entirety at App. D to Pet. and sets forth the general evidentiary rights of an inmate charged with a disciplinary offense. For example, the inmate has the right to remain silent if the underlying facts of a disciplinary charge may result in criminal prosecution. 103 Code Mass. Regs. §430.14(1). All evidence considered by the board, with the exception of informant information as defined by other regulatory provisions, is to be presented in the presence of the inmate. 103 Code Mass. Regs. §430.14(3). The reporting officer is generally required to be at the hearing, if the inmate so requests. 103 Code

(footnote continued)

In Wolff v. McDonnell, 418 U.S. 539 (1974), this Court considered what process was due in a prison disciplinary proceeding which affects a prisoner's constitutionally protected liberty interests. In setting forth constitutionally mandated procedural requirements, the Court distinguished the prison disciplinary hearing from a criminal trial and from other

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(footnote continued)

Mass. Regs. §430.14(4). The inmate is to be allowed to make an oral or written statement to the board, 103 Code Mass. Regs. §430.14(5), and is to be allowed to question all witnesses, including the reporting officer, except where doing so presents certain hazards. 103 Code Mass. Regs. §430.14(6). Finally, the inmate is entitled to present relevant, non-cumulative documentary evidence in his defense. 103 Code Mass. Regs. §430.14(7).

administrative hearings, such as parole violation hearings and job termination proceedings. 418 U.S. at 560-61, 567. The Court noted that, unlike other kinds of hearings, the state has a peculiar stake in the structure of prison disciplinary hearings because those hearings must be conducted in a manner consistent with the maintenance of order and security in an environment easily prone to disorder and danger.

> Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. . . They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. . . Relationships among inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

> It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments. . . The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety to guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process.

418 U.S. at 561-62.

In light of the need of prison officials both to utilize disciplinary procedures to insure security and swift

punishment in the prison setting, and to insure that disciplinary hearings themselves do not give rise to disorder and violence within the institution, this Court established only two due process requisites for disciplinary hearings: (1) written notice of the disciplinary charges adequate to allow the inmate to prepare a defense, and (2) a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action. 418 U.S. at 564. Even as to this second requirement, the Court left leeway for the disciplinary board to exclude certain evidence from its statement if its divulgence might implicate personal or institutional safety. 418 U.S. at

565. The Court set forth a third, qualified requisite for disciplinary proceedings: "the inmate. . .should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U.S. at 566 (emphasis added). The Court held that prison officials should retain the discretion to determine whether requested witnesses should be called. Although the Court expressly omitted any constitutional requirement that officials state their reasons for denying an inmate's witness request, the Court suggested that it would be "useful" for officials to do so, whether

the reasons be "irrelevance, lack of necessity, or the hazards presented in individual cases." Id. Two years later, in Baxter v. Palmigiano, 425 U.S. 308, 320-21 (1976), the Court reiterated its ruling in Wolff with respect to an inmate's limited right to call witnesses and to the lack of a constitutional requirement that reasons be stated for refusing to call witnesses.

It is plain that on its face, 103 Code Mass. Regs. §430.14(6) comports in every respect with the due process requirements set forth in Wolff. It does not grant unfettered discretion to refuse to call a witness, but circumscribes the exercise of that discretion by written standards fully

consistent with Wolff. However, the Massachusetts Supreme Judicial Court held otherwise, on the ground that the regulation failed to require "some support in the record" for the denial of an inmate's witness request. Real v. Superintendent, M.C.I., Walpole, 390 Mass 399, 407, 456 N.E.2d 1111, 1116 (Mass. 1983). The court reasoned, "To hold that the board need not state its reasons for refusal would render meaningless the prisoner's limited right to call witnesses." 390 Mass. at 406, 456 N.E.2d at 1116. As a blanket proposition, that ruling is clearly contrary to the precedent established by this Court in Wolff and Baxter. See also Hurney v. Carver, 602 F.2d 993,

995-96 (1st Cir. 1979); Thomas v. Estelle, 603 F.2d 488, 490 (5th Cir. 1979); Walker v. Hughes, 558 F.2d 1247, 1259 (6th Cir. 1977); Ward v. Johnson, 690 F.2d 1098, 1112-1113 (4th Cir. 1982) (en banc); Woods v. Marks, 742 F.2d 770, 775 (3rd Cir. 1984).

Moreover, nothing in this Court's more recent decisions regarding the constitutional rights of prisoners supports the expansion of prisoners' procedural due process rights beyond those set forth in Wolff. In Greenholtz v. Nebraska Penal Inmates, 442 U.S.1 (1979), the Court held that the unique structure and language of Nebraska's parole statute gave inmates a constitutionally protected liberty

interest in parole release. 442 U.S. at 12. However, the Court held that the inmates were entitled to very minimal procedural due process rights to protect that interest. The Court found that Nebraska's parole procedure, which permits an inmate to appear before the parole board and present letters and statements on his own behalf, and requires the board to inform the inmate in what respect he has failed to qualify for parole when parole is denied, satisfies the requirements of Constitutional due process. 442 U.S. at 15-16. Parole release determinations arguably have far more immediate impact on inmates than disciplinary determinations, for it is at that point

that inmates are granted or denied immediate release from confinement in prison. See Greenholtz, 442 U.S. at 19-20 (Powell, J., concurring in part and dissenting in part); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 470 (Stevens, J., dissenting). Nonetheless, the procedure required is less than that set forth in Wolff, and does not even include a limited right to call witnesses.

In Hewitt v. Helms, 459 U.S. 460 (1983), the Court held that Pennsylvania statutes regarding the administrative segregation of prisoners created a liberty interest in freedom from such segregation. 459 U.S. at 471-72. However, despite the fact that such

segregation might entail transfer to highly restrictive conditions, commensurate to disciplinary segregation, prior to any formal finding of wrongdoing (459 U.S. at 463, n.1, 467, n.4), the Court required only minimal due process. Notice of the charges which led to segregation, and an opportunity for the inmate to respond, either orally or in writing, would suffice. 459 U.S. at 476.

Constitutional rights other than procedural due process rights have also been severely restricted in the prison setting. First Amendment speech and association rights must give way to prison officials' need to restrict potentially disruptive interactions

between inmates and to limit inmates' opportunities for achieving organizational power. Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 126-33 (1977). Nor are the privacy interests of inmates to be given such weight as to preclude body-cavity searches under the Fourth Amendment. Bell v. Wolfish, 441 U.S. 520, 558-60 (1979). Moreover, inmates have no Fourth Amendment expectation of privacy in their prison cells which would entitle them to protection against unreasonable search of their cells or seizure of their property. Hudson v. Palmer, ___ U.S. ___, 104 S.Ct. 3194 (1984).

The one recent case in which this Court has expanded inmates' rights is instructive in its exceptional character. In Vitek v. Jones, 445 U.S. 480 (1980), the Court held that a Nebraska statute regarding the involuntary commitment of inmates to a mental hospital created a liberty interest in freedom from such commitment absent a finding that the inmate was suffering from a mental illness which could not be treated in prison. 445 U.S. at 489-90. There, the Court required procedural protections greater than those set forth in Wolff, such as "the right to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by

the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination..." 445 U.S. at 494-95. Due process also required that the inmate be provided with qualified and independent assistance at his hearing. 445 U.S. at 497, 500 (Powell, J., concurring in part).

The Court required this additional protection in light of the threat of immediate deprivation of a protected liberty interest, the special stigmatization which accompanies transfer to a mental hospital for involuntary psychiatric treatment, and the concomitant subjection of the inmate

to mandatory behavior modification. 445 U.S. at 494. The Court also noted that the psychiatric diagnoses which form the predicate for involuntary commitment are characterized by subtlety and nuance which make for a special risk of error and justify adversarial hearings. 445 U.S. at 495.

The liberty interest in this case, statutory good time, does not rise to the level of the interest at risk in Vitek. Its deprivation does not result in any immediate loss to the inmate. Indeed, whether it will result in loss at all is speculative, since good time may be restored to an inmate for subsequent good conduct. Mass. Gen. Laws. ch. 127, §129. Even when not

restored, lost good time may have minimal impact on an inmate, since it may not result in any delay in an inmate's release on parole and only delay the termination of parole. Wolff v. McDonnell, 418 U.S. at 561. The disciplinary board finding which leads to loss of good time may or may not be accompanied by any change in the conditions of confinement, since in many instances an inmate will be entitled to additional procedural rights and separate findings by the Commissioner of Correction before being transferred to more onerous conditions. See Parenti v. Ponte, 727 F.2d 21 (1st Cir. 1984). But see Meachum v. Fano, 427 U.S. 215 (1976). It is questionable whether any

stigmatization accompanies a finding of guilt in disciplinary proceedings, especially in light of the broad range of disciplinary offenses. See 103 Code Mass. Regs. §430.22 (1978). Certainly there would be no stigma comparable to the special stigma which accompanies psychiatric treatment. Finally, the loss of good time is predicated on simple, retrospective fact finding, to which there does not inhere the kind of subtlety and nuance typical of psychiatric diagnosis.

There is no support in decisions of this Court for the Supreme Judicial Court's expansion of prisoners' due process rights in disciplinary proceedings, and under existing law, 103

Code Mass. Regs. §430.14(6) plainly satisfies constitutional requirements. Nor can the Supreme Judicial Court ruling in Real be justified through the application of those broader principles of due process enunciated by this Court.

II. DUE PROCESS RIGHTS OF INMATES AT DISCIPLINARY PROCEEDINGS SHOULD NOT BE EXPANDED TO REQUIRE PRISON OFFICIALS TO PROVIDE RECORD SUPPORT FOR DENYING A REQUEST FOR WITNESSES.

A. The Requirement Of Record Support For Denying An Inmate's Request For Witnesses Is Of Doubtful Value In Reducing The Risk Of Erroneous Deprivation Of The Inmate's Good Time Credits.

Due process requirements are flexible and variable, and depend on the context in which they are being applied. Hewitt v. Helms, 459 U.S. at 472; Hannah v. Larche, 363 U.S. 420, 442

(1960). Fundamentally, due process entails the right to "some kind of hearing." Wolff v. McDonnell, 418 U.S. at 557-58; Boddie v. Connecticut, 401 U.S. 371, 377-79 (1971). Its purpose is to protect individuals from being deprived of some constitutionally cognizable interest through arbitrary government action. Wolff v. McDonnell, 418 U.S. at 557. It does not, however, include the assurance that the outcome of any particular hearing is "fair", but that in "the generality of cases" the required procedure will contribute to sounder government decisions. United States v. Augenblick, 393 U.S. 348, 352 (1969); Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

In Mathews v. Eldridge, 424 U.S. 319 (1976), this Court considered three factors in determining what the Due Process Clause requires in any particular context:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335. See Hewitt v. Helms, 459 U.S. at 473.

The speculative nature of the prisoner's private interest has already been noted. PP. 34-36, supra; Wolff v. McDonnell, 418 U.S. at 561.

A due process requirement of record support for the denial of witnesses at prison disciplinary hearings is, at best, of doubtful value in reducing the risk of erroneous deprivation of that interest. It has never been held that an individual's right to a fair hearing is necessarily impaired because a governmental decisionmaker has failed to provide an explanation for each and every decision made during the course of the hearing. "Although there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are the exception rather than the rule." Harris v. Rivera, 454 U.S.

339, 344 (1981) (per curiam).7/

7/ One such exception, and an exception to the following discussion generally, was announced in Gagnon v. Scarpelli, 411 U.S. 778 (1973). There, the Court held that the due process requirements for parole revocation proceedings set forth in Morrissey v. Brewer, 408 U.S. 471 (1972), apply as well to revocation of probation. The Court also held that indigent probationers and parolees are, in some cases, entitled to appointment of counsel, and that refusal of a request for counsel should be accompanied by a succinct statement of the grounds for refusal. 411 U.S. at 790-91.

Petitioner submits that Gagnon is distinguishable from this case on several grounds. First, the liberty interest at stake in Gagnon was far greater than that at stake in this case, since revocation of probation or parole results in immediate incarceration. Second, since the context of revocation proceedings is not the prison environment, there are no concerns of prison security at stake in such proceedings. For these reasons this Court rejected both Morrissey and Gagnon as providing the procedures which due process should require in prison disciplinary hearings. See Wolff v. McDonnell, 418 U.S. at 557-63. Finally,

(footnote continued)

The requirement of such explanations hinges on the function to be served. In prison disciplinary actions, for example, prison officials are required to provide a written statement of the reasons for whatever disciplinary action is ultimately taken against an inmate. Wolff v. McDonnell, 418 U.S. at 564. This is in part because such action may itself have a bearing on collateral administrative actions taken by state

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(footnote continued)

in Gagnon, the Court made clear that a request for counsel must be accompanied by a timely and colorable claim, based on the specific facts of each case, showing special need. 411 U.S. at 790. So similar requirement attaches to an inmate's request for witnesses, and certainly no such showing was made in this case. See pp. 50-51, and fn. 8 infra.

authorities, such as prison transfers and parole determinations. Id., at 565. However, wholly procedural decisions, such as the denial of a witness request, have no such collateral effects. In parole proceedings, it behooves the parole board to tell an inmate its reasons for denying his parole application, so that the inmate may have some guide for his future behavior. Greenholtz v. Nebraska Penal Inmates, 442 U.S. at 15. See also Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (decisionmaker should provide statement of reasons for final revocation of parole.) An inmate derives no similar guidance to his behavior by knowing why a requested witness was denied at a particular disciplinary hearing.

board provide written statement of evidence relied on and reasons for any disciplinary action helps to insure that prison administrators, faced with possible scrutiny by other state officials, the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (to demonstrate compliance with requirement that welfare termination be based solely on legal rules and evidence adduced at hearing, decisionmaker should state the reasons for his conclusion and the evidence relied on).

Neither of these justifications has any direct bearing on the purpose of the

The function of requiring an explanation or support for the denial of a witness request, as explained by those courts requiring such, is basically twofold. First, the courts deem such explanations to provide assurance that an inmate's right to call witnesses is not arbitrarily abrogated. Second, though not unrelated, the additional requirement is seen as facilitating judicial review of administrative action with respect to an inmate's witness request. Real v. Superintendent, M.C.I., Walpole, 398 Mass. at 426-427, 496 N.E.2d at 1116; Hayes v. Thompson, 637 F.2d 483, 487-89 (7th Cir. 1980). Cf. Wolff v. McDonnell, 418 U.S. at 564 (requirement that prison disciplinary

hearing itself. As noted above, the fundamental concern of procedural due process is that the individual not be arbitrarily deprived of some constitutionally cognizable liberty interest. To reason that the constitution requires further procedural rights to prevent arbitrary deprivation of already acknowledged procedural rights is to turn due process on its head. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." Olim v. Wakinekona, 461 U.S. 238, 250 (1983) (emphasis added). What the court below has done is to fashion a prophylactic

procedural rule to protect not a substantive interest - loss of good time - but merely to grant additional safeguards to the limited right to call witnesses. Such a rule might well be promulgated as a function of a court's supervisory powers, but it has no demonstrated constitutional base.

To the extent that the requirement of an explanation for the denial of witnesses is designed to facilitate judicial review, its utility is limited and its thrust is contrary to certain well established principles of judicial review. The important procedural right deserving of judicial protection is the right to present evidence at one's hearing, because, "[o]rdinarily, the

right to present evidence is basic to a fair hearing. . .' Wolff v. McDonnell, 418 U.S. at 566. The petitioner does not dispute this basic principle of due process, and the Massachusetts Department of Correction has recognized and codified it at 103 Code Mass. Regs. §§430.14(5)-430.14(7). But this right has never been deemed absolute, even in the judicial setting. Hamling v. United States, 418 U.S. 87, 127 (1974). Because of the special circumstances and concerns of the prison setting, prison officials must have discretion to control the exercise of the right to present evidence. Wolff v. McDonnell, 418 U.S. at 566-67. If that discretion has clearly been wrongfully exercised,

so that an inmate is denied a requested witness, important to his defense, for some reason other than one relating to the proper concerns of prison administrators, the inmate certainly has recourse in the courts, where he may allege and prove the wrongful conduct of the prison officials, regardless of whether the administrative record provides support for the prison officials' decision. Cf. Hurney v. Carver, 602 F.2d at 996 (where inmate sought to challenge a disciplinary board's denial of his request for witness on grounds of irrelevance, inmate should have alleged facts showing that denial was in fact for an inappropriate reason).

Conversely, as the facts of this case clearly illustrate, the lack of any explicit explanation in the administrative record does not, in itself, show that an inmate was arbitrarily deprived of the opportunity to call important witnesses and thereby suffered wrongful or arbitrary denial of his liberty interest. The claim made and proven in this case is merely that Real requested two inmates as witnesses, the disciplinary board denied that request, and the board did not state its reasons for, or provide explicit support for, the denial. These facts provide no basis whatsoever for a finding that Real was wrongfully or arbitrarily denied witnesses, particularly in light of the

wholly proper regulation guiding the disciplinary board's action.[8/] It is an ancient principle of judicial review of administrative action that an

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8/ Nothing in the administrative record indicates that Real explained to the board the import of his requested witnesses, nor even whether those witnesses had any personal knowledge of the events at issue during Real's hearing. On the other hand, it is clear from the record that the offense with which Real was charged was a matter of firsthand knowledge to the reporting officer. The officer was present at the hearing and, under Massachusetts regulations, was subject to questioning by Real and his counsel. J.A. 13-15; 103 Code Mass. Regs. §430.14(6).

On this record, it may easily be assumed that the disciplinary board denied Real's request for the witnesses because the witnesses' testimony was irrelevant to the charged offense and unnecessary to the board's findings. Either of those reasons for the board's action constitutes a proper exercise of discretion, both under 103 Code Mass. Regs. §430.14(6) and the constitution. See Wolff v. McDonnell, 418 U.S. at 566.

administrative body must be presumed to have acted according to the dictates of due process, and its own regulations, unless there is evidence of the contrary. Anniston Mfg. Co. v. Davis, 301 U.S. 337, 357 (1937); Douglas v. Noble, 261 U.S. 165, 170 (1923); FCC v. Schreiber, 381 U.S. 279, 296 (1965). This principle takes on particular strength when a court reviews the judgment of administrators who, like prison officials, normally have special knowledge and expertise with which to make decisions affecting the institutions being administered.

Procunier v. Martinez, 416 U.S. 396, 404-405 (1974); Youngberg v. Romeo, 457 U.S. 307, 322-23 (1982). Absent "substantial evidence in the record" indicating that prison officials have improperly exercised their authority, courts should ordinarily defer to the officials' judgment. Bell v. Wolfish, 441 U.S. at 547-48 (1979). See Block v. Rutherford, ___ U.S. ___, 104 S.Ct. 3227, 3232, 3234-35 (1984).

The practical effect, then, of the Supreme Judicial Court's ruling will not necessarily be any greater protection for inmates' substantive liberty interests in the prison setting.

Rather, it will simply shift the burden of proof in the judicial setting and thereby make it easier for an inmate to successfully challenge disciplinary actions on purely procedural grounds. Whereas under existing law it is incumbent on an inmate to allege and prove facts showing that he was wrongfully denied his right to call witnesses, Burney v. Carver, 602 F.2d at 995-96, Thomas v. Estelle, 603 F.2d at 499, those courts requiring record support put the onus on prison officials to show that they rightfully denied the inmate's request for witnesses. Neal v. Superintendent, M.C.I. Walpole, 390 Mass. at 407, 456 N.E.2d at 1116, Hayes v. Walker, 555 F.2d 625, 628-30 (7th

Cir.) cert. denied, 434 U.S. 959 (1977).9/ Such burden shifting, while

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9/ The rationale that support for a disciplinary board's denial of an inmate's request for witnesses be in the record, lest the inmate be placed at serious disadvantage in judicially contesting the board's action, see Hayes v. Thompson, 637 F.2d 483, 488 (7th Cir. 1980); Cf. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 472 (1981) (Stevens, J., dissenting), is not particularly compelling. Perfunctory denial of defense witnesses may be successfully challenged on a showing of a pattern or policy of denying all inmate requests. See, e.g., Bartholomew v. Watson, 665 F.2d 915 (9th Cir. 1982) (blanket proscription against calling certain types of witnesses was unconstitutional.)

On the other hand, certain across-the-board policies denying witness requests may be wholly justified by overarching reasons of prison security which may not appear in the record of any specific disciplinary proceeding but which may appear during the course of judicial proceedings. See, e.g., Devaney v. Hall, 509 F.Supp. 497, 500-501 (D.Mass. 1981) (where inmates were afforded opportunity to submit written statements from inmate witnesses, there were considerations of

(footnote continued)

it may be helpful to an inmate in a court of law,[10] is not without its costs to vital government concerns in prison administration.

(footnote continued)

prison security adequate to justify a policy of precluding live inmate witness testimony during disciplinary hearings held in maximum security unit of the prison).

10/ Even this burden shifting is of dubious value to the inmate. Once prison administrators adjust to the new procedural requirement and place support in the administrative record for denying an inmate's witness request, it will still be incumbent on the inmate to allege and prove that the reason was insufficient, or arbitrary, or subterfuge for an inappropriate reason (e.g., discrimination). This is a burden not unique to prison litigation, but which must be borne by any plaintiff. See Hurney v. Carver, 602 F.2d at 995.

B. The Interest Of the Government In The Safe And Orderly Administration Of Prisons Outweighs The Limited Utility Of Requiring Record Support For Denying An Inmate's Request For Witnesses.

This Court noted in Wolff that any required constitutional procedures are going to have a broad effect on all sorts of penal institutions, both minimum security and, as in this case, maximum security (see Libby v. Commissioner of Correction, 385 Mass. 421, 423, 432 N.E.2d 486, 489 (Mass. 1982)), and on a diverse prison population. Wolff v. McDonnell, 418 U.S. at 562-63. The Court has frequently emphasized the importance of the government's interest in maintaining security in those institutions. Bufkin

v. Palmer, 104 S.Ct. at 3199; Block v. Rutherford, 104 S.Ct. at 3234-35; Hewitt v. Helms, 459 U.S. at 473-75; Wolff v. Wolfish, 441 U.S. at 546-47; Jones v. North Carolina Prisoners' Labor Union, 433 U.S. at 128, 132.

The right of prisoners to call witnesses conflicts with this interest in numerous ways. Prisoners' access to witnesses must be limited by the prison administration's necessary authority to control inmates' access to each other. See Jones v. North Carolina Prisoners' Labor Union, 433 U.S. at 132-133 (1977). Indeed, it may be entirely appropriate, due to prison officials' assessment of the dangers created by a particular inmate, that a charged inmate

be wholly segregated from the remainder of the prison population. Hewitt v. Helms, 459 U.S. at 468, 473-74; United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292, 2303 (1984) (Stevens, J., concurring). Prisoners' freedom to "investigate" their cases among the prison population and to call witnesses from the population must be curtailed in light of the risks of coercion in the prison community, and of reprisal by those coerced or by inmates dissatisfied with the performance of their witnesses.[11/] The state's interest

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11/ This Court has noted the potential for retribution and coercion against witnesses who might provide information adverse to the charged inmate. Hewitt v. Helms, 459 U.S. at 476. There is, of course, also the potential that a charged inmate will coerce other inmates into testifying on his behalf. See Devaney v. Hall, 509 F.Supp. at 500.

in swift and sure punishment in the prison setting, both as a means of assuring prison control and of rehabilitating inmates by contributing to behavior modification, see Wolff v. McDonnell, 418 U.S. at 563 and n. 14, may be undermined by affording inmates time to gather evidence, by requiring a hearing schedule which would allow all witnesses to be present, and by extending the length of the hearings themselves.

A constitutional requirement of record support for the denial of witnesses at all prison disciplinary hearings surely poses extra difficulty with respect to internal security. For example, where a requested witness is an

informant or is under some protection, divulgence of such facts will place that inmate in danger. Where a requested inmate has been coerced by another inmate to offer false testimony and prison officials gain knowledge of this fact, divulgence of the information may lead to reprisal against the witness or against those who may have told officials of the coercion. Indeed, the mere fact that an inmate is unwilling to testify as a witness at a disciplinary hearing, for whatever reason, may subject him to risk of harm. Where a board's action is based on concerns about general conditions within the institution, explanation about those conditions may only exacerbate them.

Foremost, however, is the risk of omission where a general rule exists requiring disciplinary boards to explain why they will not allow a witness to be called. If the only instances in which a board may refuse to provide support for denying a witness are when there is some risk of harm in calling the witness, the refusal by the board to state its reasons will itself raise suspicions in the charged inmate's mind. Silence about specific facts, where other facts must be divulged, may speak loudly. Cf. Smith v. Rabalais, 659 F.2d 539, 543-44 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982).

Finally, the time and resources expended by correctional institutions on

large numbers of disciplinary proceedings,12/ as due process is escalated from an inmate's right to be heard to an inmate's right to an evidentiary hearing, must be taken into consideration. Unlike the courts, prisons are not institutions whose principal, or even major, function is dispute resolution or the dispensation of justice. Prisons in America today

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12/ In 1980, in Massachusetts correctional institutions, 8,814 disciplinary reports were issued. Seventy-eight percent of those reports, or 6,914, were written for 'major' infractions, thus triggering the requirement for full disciplinary hearings. Cronin and Scott, Correctional Disciplinary Statistics - 1980, Mass. Dept. Correction, Table 4, p. 12 (1983). See 103 Code Mass. Regs. §430.11, requiring the institution of full disciplinary proceedings for major offenses.

are charged with the responsibility of punishment, rehabilitation, education, ... the provision of basic physical and psychological needs, not to mention provision of legal resources so that inmates will be assured meaningful access to the courts to vindicate a broad range of rights. See, e.g., Rhodes v. Chapman, 452 U.S. 337, 352 (1981); Association for Reduction of Violence v. Hall, 558 F.Supp. 661, 663-64 and n.1 (D. Mass. 1983), vacated on other grounds, 734 F.2d 63 (1st Cir. 1984); Jones v. Wittenburg, 509 F.Supp. 653, 692-94 (N.D. Ohio 1980); Cepulonis v. Fair, 732 F.2d 1 (1st Cir. 1984). See also Burger, An Agenda for Crime Prevention and Correctional Reform, 67

ABA Journal 988 (1981), and Burger, More Warehouses, or Factories with Fences?, 8 New Eng. J. Prison Law 111 (1982) (calling for expansion of vocational training and meaningful work opportunities for inmates as well as special training for prison personnel). To impose an additional procedural requirement in the area of prison discipline is certain to involve some additional cost in time and resources, to the detriment of the penological mission as a whole.

For example, it has been suggested that the expansion of due process requirements will raise inmate expectations and will contribute to a proliferation of prisoner lawsuits. See

Jacobs, Statesville: The Penitentiary in Mass Society, 106, 136 (1977). Such proliferation has obvious implications for the costs in time and resources to prison officials who must defend these suits.13/ See Bershad, The Law and Corrections: A Management Perspective, 4 New Eng. J. Prison Law 49, 57, 59 (1977). It also promotes an adversarial atmosphere within the prison and exacerbates the "we-they" relationship between inmates and prison officials. See Singer, Prisoner Rights Litigation:

13/ Numerous studies and comments attest to the growth of prisoner litigation in the last decade. See, e.g., Widener, Foreword: The Impact of Judicial Decision-Making, 37 Wash. and Lee L. Rev. 373 (1980); Phillips, Foreword: Fourth Circuit Review, 39 Wash. and Lee L. Rev. 425, 426 (1982); Sourcebook of Criminal Justice Statistics, U.S. Dept. of Justice, Table 5.8, p. 469 (1982).

A Look at the Past Decade and a Look at the Coming Decade, 44 Federal Probation 3, 7, (1980). Finally, increased procedural requirements may contribute to the growth of bureaucracy in prison administration, with its own hidden and not so hidden costs. See Jacobs, supra, at 119; Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 639 (1979). Cf. Goss v. Lopez, 419 U.S. 565, 583 (1975) (imposition of even truncated trial-type procedures in the public school setting might overwhelm administrative facilities and, by diverting resources, cost more than it would save in educational

effectiveness); Parham v. J.R., 442 U.S. 584, 605-606 and n. 14 (1979) (procedural requirements for voluntary admission of minors to state mental health facilities may deflect mental health professionals from their primary role of patient care as well as deflect financial resources which the legislature intended for mental health care); Wolff v. McDonnell, 418 U.S. at 569-70 (introduction of counsel into prison disciplinary proceedings, with its concomitant increase in costs to the state and in adversarialness, would decrease the utility of such proceedings as a means to further other correctional goals).

The fundamental issue in this case is not whether inmates should be able to call witnesses at their disciplinary hearings when it is feasible to do so, because they should. Nor is it whether prison officials should exercise unbridled discretion in disallowing such witnesses; the Massachusetts regulation at issue does not permit it. What is at issue is to what extent prison officials must answer to inmates for the exercise of difficult responsibilities which are entrusted to them, and in what setting, and under what circumstances. The answer of the Supreme Judicial Court is, in reverse order, under all circumstances, in the context of the prison environment itself, and to such

an extent as would satisfy a reviewing court of law. This answer is not justified by the due process calculus, is not consistent with the sensitivity with which this Court has addressed the myriad difficulties of prison administration, and should be rejected.

CONCLUSION

For the reasons stated above the decision of the Massachusetts Supreme Judicial Court should be reversed.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

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STATUTORY APPENDIX

Massachusetts General Laws, Chapter 127, Section 129: Record of conduct; reduction of term; determination; certificate of allowance; period; forfeiture of deductions.

The officer in charge of each correctional institution or other place of confinement, except a defective delinquent department, shall keep a record of each prisoner in his custody whose term of imprisonment is four months or more. Every such prisoner whose record of conduct shows that he has faithfully observed all the rules of his place of confinement, and has not been subjected to punishment, shall be entitled to have the term of his imprisonment reduced by a deduction from the maximum term for which he may be held under his sentence or sentences, which shall be determined as follows: Upon a sentence of not less than four months and less than one year; two and one half days for each month; upon a sentence of not less than one year and less than two years, five days for each month; upon a sentence of not less than two years and less than three years, seven and one half days for each month; upon a sentence of not less than three years and less than four years, ten days for each month; upon a sentence of four years or more, twelve and one half days

for each month; provided, however, that no prisoner serving a sentence imposed for a violation of section thirteen B, twenty-two, twenty-two A, twenty-three, twenty-four or twenty-four B of chapter two hundred and sixty-five or section seventeen, thirty-five or thirty-five A of chapter two hundred and seventy-two, or for an attempt to commit any crime referred to in said sections shall be entitled to have the term of his imprisonment under such sentence reduced under the provisions of this section. If a prisoner has two or more sentences to be served concurrently or otherwise, the maximum period of time for which he may be held under his sentences shall be the basis upon which the deduction shall be determined; except that when a prisoner on parole is sentenced for a new crime, the sentence on which he was paroled shall be considered seperately, and shall not be aggregated with any new sentence for the purposes of determining the deductions. If a prisoner violates any rule of his place of confinement, the commissioner of correction, the county commissioners, and, in Suffolk county, the penal institutions commissioner of Boston, upon the recommendation and evidence submitted to them respectively, in writing by the principal officer, or officer in charge, shall decide what part, if any, of such good conduct deduction from sentence or sentences shall be forfeited by such

violation, and may likewise determine, in the event of the prisoner's subsequent good conduct, whether any or all of such deduction shall be restored.

A prisoner in a correctional institution of the commonwealth who is entitled to have the term of his imprisonment reduced shall receive from the commissioner of correction a certificate of discharge and shall be released from the correctional institution in which he has been confined, upon the date which has been determined by such deductions from the maximum term of his sentence or sentences. A prisoner in a county penal institution who is entitled to have the term of his imprisonment reduced shall receive from the county commissioners or, in Suffolk county, the penal institutions commissioner of Boston, a certificate of discharge, and shall be released from the institution in which he has been confined, upon the date which has been determined by such deductions from the maximum term of his sentence or sentences. A prisoner released on parole by the parole board, who has faithfully observed all the rules of his parole and has not been returned to prison or a county penal institution for the violation of his parole, shall be entitled to have the term of his imprisonment reduced by a deduction from the maximum term for which he may be held under the sentence

or sentences, but only for that period of the sentence or sentences during which he was actually confined, and in such case, the parole board shall issue to him a certificate of final discharge and release from further supervision upon the date which has been determined by such a deduction from the maximum term of his sentence or sentences. Any other prisoner released on parole from a county penal institution who is entitled to have the term of his imprisonment so reduced shall receive from the county commissioners, or in Suffolk county the penal institutions commissioner of Boston, a certificate of final discharge.

If, during the term of imprisonment of a prisoner confined in a correctional institution of the commonwealth, such prisoner shall commit any offense of which he shall be convicted and sentenced, he shall not be entitled to any deductions hereunder from the new sentence or sentences of imprisonment. A prisoner released on parole by the parole board, who has failed to observe all the rules of his parole and has been returned to a correctional institution for the violation of his parole, shall not receive deductions described in this section until he has served six months following his return to the correctional institution.

103 Code Mass. Regs. §430.09:
Preliminary Responsibilities of the Disciplinary Officer

(1) Within two (2) weekdays after receipt of the disciplinary report, the disciplinary officer shall review the disciplinary report, make whatever investigation he deems necessary and either:

(a) Dismiss the disciplinary report;
(b) With the approval of the superintendent take no immediate action on it pending the receipt of further information, or
(c) Proceed with formal disciplinary action.

(2) If the disciplinary officer decides to proceed with formal disciplinary action he shall within the aforesaid two (2) weekdays designate the offense charged as a minor or major matter and he may revise or supplement the disciplinary report. If the charge against the inmate includes the alleged commission of a felony, the disciplinary officer shall immediately notify the superintendent so that he may refer the case to the district attorney for possible prosecution. Any case referred to the district attorney shall be handled as a major matter.

(3) In designating the offense as a minor or major matter the disciplinary officer shall consider the following factors:

(a) Threat to institution security
(b) Repetitiveness
(c) Extent of harm done
(d) Mitigating circumstances

Cases involving little or no threat to the well being of others, to property, or to the security of the institution shall ordinarily be designated as minor matters.

103 Code Mass. Regs. §430.11:
Notice and Scheduling of Hearing before Disciplinary Board.

(1) After the designation of the offense as a major matter, the disciplinary report, a notice of the hearing, and a request for representation and/or witness form shall be served upon the inmate by the disciplinary officer or his designee within one weekday.

(2) If an inmate wishes to be represented in accordance with the provisions of 103 CMR 430.12(1) and/or to have the reporting officer or other witnesses present in accordance with the provisions of 103 CMR 430.14(4) and 430.14(6), he shall complete the request

for representation and/or witness form and submit it to an officer within twenty-four (24) hours of receiving it. Any officer who receives such form shall complete it and deliver it to the disciplinary officer before the close of his tour of duty.

(3) The disciplinary officer shall schedule a hearing before the disciplinary board within a reasonable time but not less than twenty-four (24) hours after the inmate has been served with both the disciplinary report and the notice specifying the time of hearing. The inmate shall be entitled to one continuance for good cause provided that any request for a continuance must ordinarily be made at least twenty-four (24) hours prior to the scheduled time of the hearing.

(g) Code Regs. Regs. §410.12:
Code of Offenses

Disciplinary offenses shall include the following acts:

(1) Disobeying an order of, lying to, or insolence toward a staff member.

(2) Violating any departmental rule or regulation, or any other rule, regulation, or condition of an

institution or community-based program.

(3) Failure to keep one's person or one's quarters in accordance with institutional rules.

(4) Being out of place.

(5) Unexcused absence from, willful failure to properly perform or refusal to accept a work or program assignment.

(6) Counterfeiting, forging, or unauthorized reproduction of any document, article of identification, money, security, or official paper.

(7) Tampering with or blocking any locking device, door, gate or window.

(8) Conduct which disrupts or interferes with the security or orderly running of the institution.

(9) Escape or possession of escape tools.

(10) Manufacture, possession, introduction or use of any unauthorized controlled substance, alcoholic beverage or associated paraphernalia.

(11) Misuse of authorized medication, for example the unauthorized accumulation of prescribed medication.

(12) Refusal to take a breathalizer test or to provide a urine specimen.

(13) Gambling.

(14) Participating in or encouraging a riot, work stoppage, hostage taking, or unauthorized group demonstration.

(15) Possession, manufacture or introduction of a gun, firearm, explosive, ammunition, weapon, sharpened instrument, knife or tool.

(16) Killing.

(17) Self mutilation.

(18) Fighting with, assaulting or threatening another person with any offense against his person or property.

(19) Use of obscene, abusive or threatening language, action or gesture to any inmate or staff member.

(20) Engaging in unauthorized sexual acts with others.

(21) Setting a fire.

(22) Willfully destroying or damaging state property or the property of another person.

(23) Unauthorized possession of property belonging to another person.

(24) Possession of anything, including money or currency, not authorized for retention or receipt by the inmate.

(25) Giving money or anything of value to or accepting money or anything of value from another inmate, a member of his family or his friend, without authorization.

(26) Stealing.

(27) Giving or offering any official or staff member a bribe.

(28) Giving or offering any official or staff member any item or service of value.

(29) Extortion, blackmail, protection; demanding or receiving money or anything of value in return for protection against others.

(30) Violating any law of the Commonwealth of Massachusetts or United States.

(31) Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, and making plans to commit any of the above offenses shall be considered the same as commission of the offense itself.

103 Code Mass. Regs. §430.23: Sanctions

(1) Minor sanctions shall include:

(a) Reprimand.
(b) Loss of privileges for a specified period of time.
(c) Room restrictions.
(d) Restitution.
(e) Extra-work duty for a specified period of time.

(2) Minor sanctions may be suspended for a specified period of time not to exceed 3 months.

(3) Major sanctions shall include:

(a) Isolation for a specified period of time not to exceed 15 days for one offense.
(b) Recommended good time forfeiture.
(c) All minor sanctions.

(4) Major sanctions may be suspended for a specified period of time not to exceed 6 months.

JOINT

APPENDIX

Office - Supreme Court, U.S.
FILED
NOV 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1329.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
PETITIONER,

v.

JOHN REAL,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

JOINT APPENDIX.

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PETITION FOR CERTIORARI FILED FEBRUARY 7, 1984.
CERTIORARI GRANTED OCTOBER 1, 1984.

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Appendix A.

COMPLAINT

NORFOLK COUNTY
SUPERIOR COURT
CIVIL DOCKET
LAW AND EQUITY

Docket No. 136228

JOHN REAL *vs.* JOSEPH PONTE

Ad Damnum $_____

Date of Writ_____

DOCKET ENTRIES

Counsel for Plaintiff	Counsel for Defendant
1982 Apr. 8 John Real Box 100 South Walpole 02071	1982 May 7 Michael J. Marks, Asst. Attorney General, Criminal Bureau, One Ashburton Place Room 1805 02108 1982 June 24 Leo J. Cushing, Assistant Attorney General

1.	1982 Apr. 8	Action entered — Complaint Filed without fee, Clerk directed to make Service by Certified Mail, Notify Attorney General. Refer to MCLS. (Garrity, J.)
2.	1982 Apr. 8	Motion for Law Library
3.	1982 Apr. 8	Certificate of Service

4.	1982 May 5	Amended Complaint - Filed Petition for a Writ of Habeas Corpus - To be Treated as Amended Complaint (Mitchell, J.)
5.	1982 May 5	Re: Writ of Habeas Corpus Ad Testificandum - Set down for hearing on 5/25/82 11:00 A.M. (Mitchell, J.) (ns.)
6.	1982 May 5	Habe Issued for 5/25/82
7.	1982 May 17	Defendant's Motion to Dismiss
8.	1982 May 17	Memorandum of Law In Support of Motion to Dismiss
9.	1982 Jun. 16	Findings, Rulings and Order on Petitioners Writ of Habeas Corpus (Mitchell, J.) (ns.)
10.	1982 June 22	Judgment (cs.) 6/23/82
11.	1982 June 24	Defendant's Motion for Stay
12.	1982 June 24	Notice of Appeal (John Ponte)
13.	1982 June 25	Notice of Service of Notice of Appeal (cs.) The Honorable Joseph S. Mitchell, Jr., Associate Justice of the Superior Court, 1112 New Courthouse Building, Boston; Mr. John Real, Box 100 South Walpole, Mass.
	1982 July 2	Transcript Filed (ns.)
14.	1982 July 2	Petr's Motion to Amend Supplementary Complaint
15.	1982 July 2	Motion for T.R.O. and Preliminary Injunction Pursuant to Rule 65 of M.R.C.P.

A True Copy

Attest: /s/ Frank R. Davis
Assistant Clerk

Commonwealth of Massachusetts

Norfolk, ss. Superior Court
Civil Session
No. 136228

John Real verses Joseph Ponte,.
Superintendent of M.C.I.-Walpole
Date 4/6/82

Complaint ordered filed without fee; Clerk directed to make service by certified mail — Notify A.G.; Refer to MCLS (Garrity, J.)

Attest: /s/ M. A. Podolski
Assistant Clerk

PETITION FOR A WRIT OF HABEAS CORPUS

Comes The Petitioner John Real, in The Above-Entitled Caption and moves This Honorable Court Pursuant to M.G.L.A. c. 248, s. 1, et seq. To issue a writ of Habeas Corpus, in Support of his Petition. Petitioner Shows And Alleges:

1. Petitioner is presently Confined at M.C.I.-Walpole under The Sole Custody of The Superintendent, Joseph Ponte, his Agents, employees, And Servants or Successors in office.

2. That on June 14, 1979, Petitioner Was Sentenced To 3 to 5 years at M.C.I.-Walpole, For Posession of a Shot Gun, imposed By middlesex Superior Court By The honorable Judge J. Irwin

Facts of This Case.

3. Block-9 at M.C.I.-Walpole Consists of Two Seperate Floors, The First Floor has Five Cells on each Side of The Tier, The second Floor has Ten Cells on each side of the Tier. And is Not a permanent Housing Unit For inmates, But a Segregation Unit From Population Holding inmates Temporar-

ily To See The Disciplinary Board members For Disciplinary charges. For prison Violations Such as Rules.

4. Petitioner Was Takeing From population and has Ben in 9-Block or I.D.U. (Institution Discipliary Unit) Since early February of This year 1982, And is not allowed T.V. Radio, Personal property, Regular Visits. Regular Law Library, Regular Canteen privilages and No exersices And Only Allowed Two Showers a Week.

5. Petitioner is Not Doing Any Sort of isolation or Room Detintion But Awaiting Action.

6. Petitioner Before Seeing The disciplinary Board members in Late February of 1982 Was Not Allowed, Regular Visits, Regular Canteen privilages, T.V. Radio, Exersices. Law Library and Full Shower privilages.

7. That After Petitioner Seen the Disciplinary Board members early February and Found Guilty of charges and Recommended Departmental segregation (Block 10,) Petitioner Appealed To the Superintendent And Till his Final Decision petitioner Does No isolation Room Detintion or Any other Sanction And is Still Denied his T.V. Radio, Regular Visiting Previlages, Regular Canteen privilages, Regular Showers, Regular Law Library privilages, Regular Canteen privilages and No exersices.

8. That Before and intill the Final Decision From The Superintendent, Petitioner should have his Radio, T.V. Property, Regular Visits, Regular Canteen, Regular Law Library. Regular Showers And exercises.

9. And That After Petitioner has Recied Superintendents Final Decision and placed in isolation or Room Detintion (which is What Petitioner is Doing 24 Hours a day) For his chages if Dinied Lowering or Dismissing the Disciplinary Decision on Petitioners Appeal, Petitioner After Doing his isolation or whatever Sanction Should Be Allowed To have his Regular Visits, Regular Canteen Privilages, Regular Law

Library, Regular Showers and Exercises. And intill he is Seen By The D.S.U. Board (Departmental Segregation Unit) For a Decision From The Board of Wether or Not Petitioners Charges Calls For placement in D.S.U. or population.

10. That Petitioner After Final Appeal Decision From Superintendent has To Wait in a 90 day Time Limit to See The D.S.U. Board And in wen at the Time Seeing the D.S.U. Board with Could Be at the 90 day Limit, There is No Right of Petitioner Having his Lock up Time since day he was Locked up Counted Towards a D.S.U. Boards Decision To place Petitioner in the D.S.U. Unit, or And the Time of 90 days spent in Lock up Awaiting To See The D.S.U. Boards Decion Counted if The D.S.U. Board places Petitioner in Block 10. or D.S.U. Unit.

11. That Before Seeing The D.S.U. Board Petitioner should Have his Right To T.V. Radio, property, Regular Visits, Regular Canteen, Regular showers, Regular Law Library and exercises Till Such Time Petitioner is placed in D.S.U. Block 10. (Departmental Segregation Unit Block-10).

12. Petitioners Rights are Violated Wen he has To Have a visit handcuffed At All Times or Have a Screen Between Him And his visit And No Contact Visiting Rights.

13. Petitioner Also is Not Allowed To Buy Any Food out of the Canteen And only Allowed To Buy Cosmetics such as shampoo, Toothpaste, And Also only Allowed To Buy Ciggarretts.

14. That also Petitioner is Not Allowed to Have Law Library Wen Needed And only Allowed Law Library every And After Two Weeks and once After every Two Weeks.

15. That Petitioner is Denied his T.V. Radio and Full Property such as clothes, Books and magarzines and only Allowed 5 magarzines and 5 paperback Books. And maches.

16. That Petitioner is not Allowed to Exercise at All,

17. That Petitioner is only Allowed Two Showers a Week.

18. That Petitioner is Denied Regular Visiting Hours and days.

19. Petitioner is entitled To have some if Not all of his Rights And As Same Rights if Not All as the prison population Would Have And At Any Rate Petitioner is Not in D.S.U. Block-10, But in I.D.U. block-9 Wich is A Temperarily Confinement Till going to D.S.U. Block-10 or To Do isolation or any Sanction And Then After Awaiting To See The D.S.U. Board or To Be placed Back in population. And Petitioner Till then Should Not Be Treated As a Departmental Segregation Unit inmate,

20. Petitioner Being Denied his Regular visiting privilages. Canteen privilages, Law Library Regular privilages, Shower privilages, Property, T.V. Radio, And his Exercises Violates Petitioners Constitutional Rights.

Wherefore, Because of The Foregoing Facts petitioner is Suffering And By Respondent in Violation of the United States Constitution and Therefore he prays:

(A) That This Honorable Court gives a Declaratory Judgement That Respondent's policies, And Practices Herein described And Complained is Unconstitutional And a Violation of Petitioner's Secured First, And Eigth Amendments of The United States Constitution.

(B) order Respondent By issuing a order To give Petitioner his T.V. Radio, Property. Rights. or Privilages.

(C) order Respondent By issuing a order To give Petitioner his Full Canteen Rights or privilages.

(D) order Respondent By issuing a order To give Petitioner his exercise Rights or privilages.

(E) order Respondent By issuing a order To give Petitioner At Least 7 Hours a Week Law Library Rights or Privilages,

(F) order Respondent By issuing a order To give Petitioner everyday Showering Rights or privilages.

(G) order Respondent By issuing a order To give Petitioner is Rights or Privilages To Contact Visits, No handcuffs or Screens Seperating Petitioner And his Visits.

(H) order Respondent by issuing a order To give Petitioner his Rights or Privilages in having his visit in Population visiting Room And To have his visit With The Rest of the Population.

(I) order Respondent By issuing a order To expand and make more Visiting days And Hours For Petitioner and his visits,

(J) order Respondent By issuing a order To have a Better And To Correct The 90 Day Awaiting D.S.U. Board members And Shorten it To a 30 Day Awaiting D.S.U. hearing. And To have The Days While Awaiting D.S.U. hearing Counted And added if Sent To D.S.U.

(K) order Respondent By issuing a order To have the time Awaiting The D.S.U. Board Counted And Added Wen Being classified D.S.U. inmate By D.S.U. Board.

(L) order Respondent By issuing a order That Repondent give All inmates At I.D.U. Block-9 The Same Rights or privilages That Petitioner gets in This Action or prayers B, C, D, E, F, G, H, I, J, K, in This Action.

(M) order Respondent By issuing a order preventing Respondent From retaliating Against Petitioner.

(N) or in The Alternative grant a hearing in This matter.

(O) Appoint a Attorney To Represent Petitioner in This Action.

(P) That this Petition Be Granted.

Respectfully Submitted.

/s/_____

John Real, Pro, Se,
Box, 100.
South Walpole, Mass. 02071.

Subscribed And Sworn Before Me This 23 Day of March 1982.

/s/_____

Arthur G. Gauthier — Notary Public

Commonwealth of Massachusetts

Received & filed
May 5, 1982
Clerk of the Courts
Norfolk County

Norfolk, ss. Superior Court
Civil Session
No. 136228

John Real verses Joseph Ponte,.
Superintendent of M.C.I.-Walpole
Date 5/5/82
to be treated as an amended complaint (Mitchell, J.) Att. R. Moscow Asst. Clerk

PETITION FOR A WRIT OF HABEAS CORPUS

Comes The Petitioner, John Real in The Above-Entitled Caption and moves This Honorable Court Pursuant to M.G.L.A., c. 248, s. 1, et seq., To issue a writ of Habeas Corpus. In Support of his Petition, Petitioner Shows And Alleges:

1. Petitioner on June 14, 1979, Was Sentenced To a 3 to 5 year M.C.I.-Walpole Sentence, For Posession of a Shot Gun on indictment No. # 79-0561 (mittimus Papers Attached HereTo as Exhibit "A") imposed By The Honorable Judge J. Irwin, in middlesex Superior Court. And is presently under sole Custody of Joseph Pont.

Facts of Case

2. On the morning of December 24, 1981, in The prison Metal shop Industries at M.C.I.-Walpole. While Petitioner Was At The Coffee Refreshment Wagon Noticed a Few inmates standing around the Metal Shop's Front office that Attracted Petitioner.

3. Petitioner Walked into the Front Office where he Noticed a Correctional officer yelling at a inmate and Supervisor John

Balayko Keeping Correctional officer and inmate apart from each other.

4. Supervisor Balayko Then Approched Petitioner And other inmates To Leave And all other inmates Left except Petitioner as Supervisor John Balayko Was Leaving Petitioner stayed.

5. Petitioner Was at the Far side of The office Waching Supervisor John Balayko yelling and Correctional officer yelling at The inmate and Calling on the phone for other Correctional officers.

6. Supervisor John Balayko Then Noticed Petitioner and Came Toward Petitioner Telling Petitioner To Leave or he would Lock petitioner in his cell for Disobeying a order.

7. Petitioner started to leave The office when a Dozen or so Correctional officers ran in the Front office and one Correctional officer — Doolin Stopped Petitioner to Search and ask Questions Then Let Petitioner go.

8. As petitioner Was Leaving The Front office, Supervisor John Balayko Approched Petitioner Calling 2 other Correctional officers To Lock Petitioner in his Cell,

9. Petitioner Was explaining how he was stopped By Correctional officer — Doolin To Be Searched and Questioned And Also Pointed at the Correctional officer — doolin.

10. At this Point Another Correctional officer Senior interupted and Told Petitioner very Harshly and demandingly to get to his cell, and Petitioner was escorted to his cell By 2 Correctional officers. And placed in his cell at his cell Block Housing Unit.

11. Sometime Later Petitioner Wass Forced to Block-10 segregation Unit and Transported out of Block-10 and M.C.I.-Walpole To M.C.I.-Norfolk.

12. At M.C.I.-Norfolk Petitioner Recieved his Disciplinary charges of Disobeying; Conduct Wich disrupts; & Participating in or encouragin a riot Work Stoppage, Hostage Taking or

unauthorized group demonstration. On Disciplinary Report No. # 814065.

13. Said Disciplinary No. # 814065. Was givin To Petitioner on December 31, 1981 at 2:20 p.m. (see Exhibit "D") 5 days and some Hours Later From the Date that Petitioner was Locked up on December 24, 1981. By Supervisor John Balayko, and Saist Disciplinary No. # 814065 Was givin To Petitioner Later Then 4 days since The Time he Was Locked up as Required By institutional Rules and Regulations.

14. The Disciplinary Board members Did not Follow institutional Rules And Regulations and Found Petitioner Guilty of all charges and Sentenced Petitioner To 200 Days lost of good time and 30 Days isolation and Recommended Departmental Segregation Unit For Petitioner.

15. After Petitioner And his Lawyer Witnessed and Tape Record all statements of Supervisor John Balayko that He stated, (1) That he did Notice Petitioner Pointing To a officer and Trying To explain Till another officer interupted and had Plaintiff go To his cell.(2) That Petitioner was Not involved in Nothing But just standing at end of the office.(3) That Petitioner Was The only inmate that stayed in the office. ."

16. Dispite John Balayko's Testimony The Disciplinary Board Found Petitioner Guilty of all charges (see exhibit "B" of Copie of Writtin Disciplinary Report of John Balako No. # 814065, and Appeal Back as Exhibit "C" of Appeal Both Attached Hereto). And Petitioner Appeal Decision which Apeal came Back and Superintendent Reduced 200 Days Lost of good Time To 150. And lowered isolation.

17. Besides Petitioners charges By Supervisor John Balayko Being Arbitrary, Capricious and somewhat Fraudulent as Petitioner should of just Ben charged With Disobeying a order, Petitioner should of Had The Disciplinary Report No. # 814065 Dismissed on grounds That institutional Rule Required a inmate To Recieve his charges Within a 4 Day period.

18. That Petitioner Was a Victim of Correctional Officers Revenge over one of There Fellow Correctional Officers Being Hurt the Day Before Christmass on December 24, 1981 Along With Two other inmates (two other inmates May Be Brought in The Honorable Court as Witnesses who were victims of Correctional officers Revenge Names Withheld For Fair of prison autiorities retaliation) who Lived in The same Housing Unit With Petitioner as Petitioners Housing Unit All inmates were Clapping and Laughing at Guards in a Happy manner That a Correctional officer Was Hurt, and the two other inmates who were victims also Worked in the prison Metal shop. At the Time of December 24, 1982.

19. That Was when Petitioner and other Two inmates were Forced To Block-10 Segregation where Petitioner was Transported to M.C.I.-Norfolk segregation Unit after Being Threatened By guards, with physical assaults, as guards were mad cause one of there Fellow officers Being hurt And inmates laughing at it.

20. Petitioner Was also Found Guilty on Disciplinary Report No. # 814066 For Contraband and Sentenced to 15 days isolation when in Fact Petitioner Never Recieved Disciplinary Report No. # 814066 as Petitioner proved at Disciplinary Board when petitioner asked For the Disciplinary Board "Cover" sheet that a Correctional officer signs to wether or not Petitioner recieved the Disciplinary Report and if Petitioner Signed or Refuse to signe Disciplinary Report. (See Appeal Form on Both Report Nombers 814065 and 814066 Attached Hereto).

21. The Disciplinary Board Failed to show "Cover sheet" and did not have one but sentence petitioner to 15 Days isolation any ways. For Contraband in property.

22. Both Disciplinary Reports Nombers # 814065 and # 814066 were heard at the same day and time in front of the Disciplinary Board who were same members.

23. The Disciplinary Board deprived Petitioner of his Due process rights and Acted Arbitrary and Capricious in Denying Petitioner Due Process.

24. Respondent superintendent acted Arbitrary and capricious and is still acting that Way in Keeping Petitioner in Segregation isolation Status since December 24, 1981 and has Not Giving Due process Requirements to Petitioner and Refuses to Do so.

25. Petitioner is Being Confined in Segregation Status in a Unconstitutional matter And Deprived of his Due process Rights.

Wherefore, Because of The Foregoing Facts Petitioner is suffering Life, Liberty and Limb in The Unconstitutional procedures of the Respondent and prays.

A. A Declaratory Judgement That Repondent's Action is Unconstitutional and in Violation of Petitioners due process Rights.

B. immediate Release from segregation Confinement and placed Back in the Prison Population.

C. expunge Disciplinary Report No. # 814065

D. expunge Disciplinary Report No. # 814066.

E. That This Petition Be Granted.

Respectfully Submitted

/s/_____

John Real, pro se,
Box 100, South Walpole,
Mass. 02071.

Subscribed and Sworn Before Me
This 26 Day of April 1982.

/s/_____

Arthur G. Gauthier
Notary Public

John Real

MASSACHUSETTS DEPARTMENT OF CORRECTION

DISCIPLINARY REPORT

Date 12/24/81 **Institution** _____
Inmate John Real **No.** 37170 **Housing Unit** _____
Offense #1 #8 #14 **D-Report No.** 814065

Disobeying: conduct which disrupts
Participating in or encouraging a riot work stoppage, hostage taking or unauthorized group demonstrations.

Minor ☐ **Major** ☒ **Referred to District Attorney** ☐

DESCRIPTION OF OFFENSE

On 12/24/81 at approx. 10:25 while trying to separate an inmate from the Officer he was attacking I told John Real and other inmates who were going to come into the cost office from the shop, to stay in the shop and return to their jobs. The other inmates obeyed but Real came into the cost office. A little while later while keeping inmates in one section of the cost office, I again told John Real to leave the cost office. He did start backing towards the door. After making sure the Off. was not seriously hurt I again told Real to leave the cost office. By this time Officers were responding to the alarm and I asked one of them to make sure Real was locked in his room.

Reporting Officer
Signature John Baleyko **Title** Supv. Ind.
Shift Commander's Signature _____
Disciplinary Officer's Signature /s/ Curtis
Finding and Sanction, if any _____
Results of Appeal _____

Exhibit "B"

MASSACHUSETTS DEPARTMENT OF CORRECTION

DISCIPLINARY HEARING

Date of Hearing 2/10 **Institution** Walpole
Inmate Real John **No.** 37170
Offense 1,8, 14 **D-Report No.** 81 4065

The inmate has been advised of his right to remain silent since the offense charged has been or may be referred to the district attorney. ☐

The following is a summary of the credible evidence presented to the disciplinary board:

Plea/Not Guilty

R/O present testified report complete & correct
Inmate states he was trying to follow out the order but was interupted by being shaken down

taped

Finding: Guilty
Sanction and Recommendations: # 8 & # 14-15 days Iso 200 days LGT DSU #1-15 days Iso
Reasons for Sanction and Recommendation:
see attached sheet
The inmate has been advised of the finding, sanction and recommendations of the Board: ☑
The inmate has been advised of his right to appeal this decision within five (5) days. ☑

F. Millette	Isberg	D.J. Miller
/s/ (Chairman)	/s/ (Member)	/s/ (Member)

A copy of this document has been delivered to the inmate. ☑
Officer's Signature /s/ F. Millette Date 2/12

2/10 1, 8, 14 Real J. 37170 #814065

Using the criterea of preponderance the board believes clear guilt.
1 Inmate was ordered a number of times before he attempted to comply.
8 In view of the incident and violation of code # 1 violation of # 8 is in order.
14 In view of the seriousness and explosive situation he did participate/encourage to a rioutous condition.
With these findings the sanction is warented.

APPEAL FORM

Inmate's Name JOHN REAL No. 37170
Report No. 814065 and 814066

a. (Minor) If you wish to appeal the Disciplinary Officer's disposition of this case you may request the Disciplinary Board to review his findings. Such appeal must be made to the Disciplinary Officer, in writing, within 24 hours of the hearing. The Disciplinary Board will schedule a hearing within five days.

b. (Major) If you wish to appeal the Disciplinary Board's disposition of this case you may request the Superintendent to review the Board's findings. Such appeal must be made to the Deputy, in writing, within 5 days of the board hearing.

c. The Commissioner of Correction reviews all cases involving loss of good time.

(Use Space below for your written appeal. Use extra sheets of paper if needed.)

On February 10, 1982, Mr. John Real appeared before the Disciplinary Board at MCI-Walpole to answer to the charges levied against him in Disciplinary Reports 814065 and 814066. In Report #814065, Mr. Real was charged with violations of 103 CMR 430.22 (1), 430.22(8) and 430.22(14). In Report # 814066, Mr. Real was charged with violations of 103 CMR 430.22(15), 430.22(23) and 430.22(26). With regard to the first report, the Board found Mr. Real guilty of violating 430.22(1) and guilty of violating 430.22(8) and (14) combined. The sanction included 15 days isolation for each finding of guilt and, on the basis of the two combined charges, the Board recommended a 200-day loss of good time and a DSW referral. All

[Remainder deleted by agreement.]

• • • • • • • •

RESULT OF REVIEW

After reviewing your case involving Disciplinary Report(s)# Appeal Denied 814066. Combine charge 8 & 14 reduce sanction to 10 days isolation on these charges. Reduce loss of good time recommendation to 150 days. Sanction and findings on #1 to remain.

81-4065

Members of the Disciplinary Board

/s/ J. Ponte — /s/ John Real
Superintendent

Exhibit "C"

John Real, Dec. 31, 1981

request for representation. C.C. copies.
M.C.I. Walpole
81-4065
81-4066

Wally. Northeastern Law School. Boston Mass.
Area Code (617) 437-3660
Area Code (617) 437-3660.
Inmate: Dale LaTaille.
Inmate: Robert Thayer.
C.O. officer who got hurt at that time in D-report.
instructor: Balayko all Four Witness can Testify to Alleges or Charges mention at hearing for D-Report Number 814065
C.O. James Donnelly
D-Report No. 814066.

I Wish To Be heard on D-Report No. 814065 and D-Report No. 814066 on The Same Day as scheduld for Jan. 7, 1982 on Dereport No. 814065 I like To Have for Witnesses inmate Dale LaTaille. And inmate Robert Thayer. And the Reporting officer John Balayko and The officer Rich who got hurt that day mention in D-Report No. # 814065.
and on D-Report No. # 814066 I Want Officer James Donnelly for Witness.

I also Want the People of Northeastern Law School to Represent me in D-report Numbers # 814065 and 814066 at January 7, 1982

Thanky you
Sincerely
John Real Now at M.C.I. Norfolk. Time 10 after 2 p.m.

December 31, 1981

Petitioner Received Disciplinary Report signed By officer — Received SCO M. Barboza—12/31/81—2:20 p.m.

Exhibit "D"

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 136228

JOHN REAL,
Petitioner

v. MOTION TO DISMISS

JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Respondent

This is a motion by respondent, through his counsel, to dismiss the petition for writ of habeas corpus in the above-captioned action. As reason therefor, respondent contends that the petition was improvidently filed, as more fully set forth in the memorandum of law attached to this motion and incorporated herein.

Dated: May 12, 1982
Boston, Massachusetts

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General

By: /s/_____
Michael J. Marks
Assistant Attorney General
Criminal Bureau
One Ashburton Place, Room 1805
Boston, Massachusetts 02108
Tel. No. (617) 727-2240

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Superior Court.

Nos. 136228 and 126442.

JOHN REAL

v. HEARING ON PETITION FOR WRIT OF HABEAS CORPUS

JOSEPH PONTE

Before: Mitchell, J.

Tuesday
May 25, 1982.

The Superior Courthouse
Dedham, Massachusetts.

Appearances:
John Real, pro se, for the petitioner.
Michael J. Marks, Esq., for the respondent.

ARTHUR E. BAKER
Official Court Reporter

INDEX

Witness	Direct	Cross
John Real	3	

Tuesday, May 25, 1982.

THE CLERK. No. 24 on the list, Civil Action No. 126442, John Real v. Joseph Ponte. This matter is on for hearing. Will counsel please identify themselves for the record.

MR. MARKS. Michael Marks, your Honor, representing Joseph Ponte, Superintendent of Walpole.

THE COURT. This is a real petition for habeas corpus this time. He wants out.

All right. Let's have him sworn.

JOHN REAL, Sworn

Direct Examination

Q (By the Court) What is your name?
A John Real.
Q How old are you?
A Twenty-nine.
Q How far have you gone in school?
A Ninth grade.
Q Where are you incarcerated?
A Nine Block, MCI Walpole.
Q How long have you been in Walpole?
A Since 1979.
Q Why were you sent to Walpole?
A Three to five for a sawed-off shotgun.
Q Three to five for a sawed-off shotgun?
A Yes.
Q And from what date have you been there?
A I got my sentence June 14, 1979.
Q Are you eligible for parole?

A I seen the parole board. They denied me last month.
Q So you have served almost three years of your sentence, right?
A I finished three years. I am now doing good time. I lost my good time.
Q In other words, if you had your good time, you would be out?
A Right.
Q Is that right?
A Yes. I have already served my good time and I am going into the other half that I stil got to do.
Q All right. Why are you in Block 9?
A Disciplinary measures, for disobeying an order and conduct which disrupts.
Q When did this happen?
A This happened December 24, 1981.
Q What happened on December 24? What did they do to you?
A Well, I was forcibly tooken out of my cell and shipped out of prison to another prison, segregation, over some officer getting hurt that they at first thought I had something to do with because I was — they thought —
Q Where did they send you?
A To Norfolk. And from there —
Q How long were you at Norfolk?
A Maybe about a month in Norfolk segregation.
Q Did you get any notice of why you were in Norfolk, any written notice?
A No, I didn't. I also got proof on that, too.
Q You didn't get any written notice?
A I didn't get no notice.
Q Did you have any hearing on it?
A Excuse me. I got a written notice after four days. The institutional policy is you are supposed to have a written notice within four days, no longer than that.
Q And you received that notice?

A Yes, I did.
Q And what did the notice say?
A The notice said that I was charged with hostage taking and participating in a work stoppage and disobeying orders and conduct which disrupts. When I seen the disciplinary board —
Q Wait a minute. You are going too fast. It's difficult to hear you. Did you have a hearing while you were at Norfolk?
A No. They gave me the hearing at MCI Walpole and they —
Q Wait a minute. When did you return to Walpole? When were you taken back to Walpole?
A I think February 10 is when I was taken back to Walpole.
Q So you were at Norfolk for over a month?
A From December 24 to February 10, I was at Norfolk, yes.
Q And you didn't have any hearing at all?
A No hearing at all.
Q All right. When you got back to Norfolk, what happened?
A To Norfolk?
Q I mean Walpole.
A When I got back to Walpole, I told the officials by their own guidelines and rules that —
Q Well, did you have a disciplinary hearing?
A Yes.
Q When?
A I am not sure. I have it down on my records.
Q How long after you got back?
A I think within a couple of weeks or so after I came back.
Q All right. Did you request counsel?
A Yes. There was a counsel there.
Q Representing you?
A Yes.
Q Did you request any witnesses?
A Yes, I did. They refused my witnesses.
Q What witnesses did you request?

A I requested Robert Daze, who was also lugged or forcibly taken out of population over the officer getting hurt. And I also requested another inmate, Latelle, that also got lugged out of population for the officer being hurt the day before Christmas.

Q How about Correctional Officer Frank Bartlett? Did you request him?

A Well, we are talking about another disciplinary matter. We ain't talking about the same one. We are talking about the recent disciplinary matter. Okay. That there was — I requested for the witness — I'll start all over on that. I thought you were bringing up the Nine Block violation for —

Q I didn't mean to mislead you.

A Okay.

Q Let's go back to the original hearing.

A The original hearing —

Q Well, let's finish up with this. As I understand it, you had a hearing, you requested witnesses and they denied you the witnesses, is that right?

A They denied me the witnesses and sentenced me to isolation to around, oh, forty days, I think, to about fifty days.

Q Fifty days?

A Well, for all these charges, they put — they recommended DSU segregation on the fact that although I wasn't involved with the incident of the officer getting hurt, just because of the fact that I was there, I could have possibly started a riot.

Q All right. So they gave you fifty days isolation?

A For all the charges they had.

Q And what else? How about good time?

A They recommended 200 days loss of good time.

Q Two hundred days?

A Yes. And I appealed up to the superintendent. The superintendent gave me the appeal back and he lowered the 200 days to 150 days and then he also lowered my isolation from fifty days to forty days for the whole thing. He lowered the sanction

that was fifteen days isolation for both charges and he combined those both charges and he lowered it to ten days each. He did not recommend DSU. Normally, when he oversteps — when he agrees with the disciplinary board decision that an inmate has to be DSU'd or has to see the DSU board, he usually states on the appeal "DSU to remain" when he lowers any sanction at all but my appeal came back with no DSU remaining, no nothing. So that means that after I do my isolation time at Nine Block, which is solely an isolation unit, that I will be put back in population. But with the officials' knowledge that I am always helping inmates with their legal work and sending them to court, which I have on the last couple of weeks done with a couple of inmates that went in front of you and got released back to population, all of a sudden, the superintendent don't want to let me out. He says I am seeing the DSU board this Thursday.

Q The disciplinary board?

A The DSU board is the departmental segregation unit. I will be in front of the departmental segregation unit board because the superintendent says that he wants me there, even with the appeal that he gave me. Somehow he had a change of heart. But by right, I got the appeal, as this evidence right here shows. By right, I should be out of Nine Block back to population because of the appeal itself. It speaks for itself. There is no DSU recommendation on the appeal but, you know, like I said, just because the guards know about my capability of helping inmates with their legal and that process, all of a sudden, I am not getting out. It seems like they want me put in segregation with full punishment.

Q For what?

A Beats me.

Q What is the DSU board?

A The DSU board is where an inmates goes to find out whether or not the final decision — this is where they decide if

he is going to go to segregation in Ten Block for any period of time.
Q Without a hearing?
A No.
Q Do you have a right to counsel?
A You have a right to counsel.
Q Do you have a right to bring witnesses?
A That I am not sure of. I don't think so. As a matter of fact, I got those two papers saying that I will see the DSU board but if I see the DSU board, they are violating my due process because the appeal itself doesn't state I see the DSU board. It is only a change of mind personally by the respondent himself.
Q Well, don't get into the legalities of it because you are going to get lost. I just want to know whether or not you have all of your constitutional rights. Do you have a right to be represented by counsel?
A Yes.
Q Do you have a right to have witnesses?
A No.
Q All right. Stop right there.
A The issue which I would like to bring up is that I am — the appeal itself, okay, is what I want to bring up. When I got taken out of population and the disciplinary board recommended I see DSU in the first place, that was overruled by the superintendent in not stating that I see the DSU board or anything and now I shouldn't even be seeing the DSU board.
THE COURT. Would you get me a copy of the regulations? They are on my desk.
A I would also like to bring up the Nine Block conditions.
Q Well, that is not before me.
A Okay.
Q Let's go back a few steps. You have a petition here that says that your sentence expired the last day of January, 1982.
A Right.

Q And you say because respondent imposed loss of good time of 150 days — when was that done, back in 1980?
A The ticket number is 80, which would be 1980. They start off with the year and then they put in the ticket number. They imposed 150 days loss of good time.
Q You state here, "Petitioner on March 28, 1980, was denied due process rights of a fair and proper hearing at a disciplinary hearing in front of board members DuFresne, Balako and Flynn and was denied an important witness, who was Correctional Officer Joseph Gaffney."
A Right.
Q How did that come up? Why were you before a disciplinary board on March 28, 1980?
A On February 8, there was an incident down the gymnasium at MCI Walpole where an inmate was killed and I was taken out of population and brought to Ten Block. And me and my lawyer was at the disciplinary hearing and we continued the disciplinary hearing and we requested the witnesses Joseph Gaffney and Frank Bartlett.
Q Okay.
A So that was our right in requesting a witness to be there because it was an important issue. It was for a case in court. So comes the hearing on the 28th and we got Officer Frank Bartlett for a witness but we didn't get Officer Joseph Gaffney for a witness, which he was an important witness because he made a few statements about some self-defense background of the case.
Q Were you accused of killing this inmate?
A I got five years at Concord for it.
Q To be served on and after what you are serving now?
A Yes. And they denied me that witness, and because they denied me that witness, I didn't have a full statement to go to court with on what he seen.
Q All right. If the 150 days is given back to you, will you have served all your time at Walpole?

A Most definitely. I done half my good time. If my 150 days was given back to me, then I am released from that sentence and — like I said, they denied me a witness and I have a court case in court and that statement that that officer could have given would have been beneficial to my case.

THE COURT. All right. What do you want to say?

MR. MARKS. Your Honor, I think the most important thing in this case is, as Mr. Real said, A, he was convicted of manslaughter as a result of the death of the inmate and is going to serve a five-year-from-and-after sentence at Concord. He believes to be important, I think, the fact that the hearing that he is complaining about occurred more than two years ago.

THE COURT. Okay. So what?

MR. MARKS. At which time he was represented by counsel. The hearing was continued so that witnesses could be present. It is my understanding that an appeal was filed and it was denied and, certainly, the petitioner's rights were not violated in any way as a result of the hearing.

THE COURT. But he didn't have an important witness present.

MR. MARKS. Your Honor, they continued the case at least once so that this witness, whether he was important or not, could be present. I don't know why he wasn't present. But Mr. Real was represented by counsel.

THE COURT. I understand.

MR. MARKS. And more importantly, he was convicted of manslaughter.

THE COURT. But his due process rights were violated. You can't do it. You just can't do it. The constitution doesn't leave these gentlemen when they go into Walpole. It just doesn't leave them at the door. The cases are clear on that.

MR. MARKS. I would also point out the fact that the regulations of the institution put the onus on the petitioner, the inmate, to get his own counsel. The institution is under no compulsion to get counsel.

THE COURT. He had counsel.

MR. MARKS. I am referring to the case prior to this.

But in any event, a petition for habeas corpus in this instance should not lie because the petitioner is not entitled to immediate release from any sentence that he is serving.

THE COURT. Yes, he is.

MR. MARKS. Especially since he has a from-and-after.

THE COURT. That he can go to. He wants out of Walpole now. That is what we are talking about and this is a petition for habeas corpus. This is for release from the institution.

So I don't think I have any discretion in the matter. His constitutional rights were violated. He should get back his 150 days good time and he should start serving his five years from-and-after.

MR. MARKS. Just one other thing that might influence your Honor. The petitioner was seen by the parole board on March 19, 1982. Parole was denied at that time. The parole board has another hearing scheduled for December of this year to see the petitioner once again on his parole application.

THE COURT. I don't know what is in their minds. They might not have liked the fact that he has a mustache coming down here. I don't know. Are there reasons why they denied parole?

MR. MARKS. I would assume as a result of the letter they sent that it has to do with his activities in prison not only in getting a D report but committing a murder while in prison. I would assume that might have something to do with not granting the parole.

THE COURT. What I am going to do is say that the hearing that was held in March of 1980 was an unconstitutional hearing and that it is null and void and he gets back his 150 days good time and he can start serving his five years from-and-after. I will issue such an order.

Now, I am going to dismiss this other one as moot.

THE WITNESS. May I ask if you would give me a minute on the Nine Block thing?

THE COURT. What has that got to do with anything if you are out of Walpole?

THE WITNESS. Well, will they ship me out of Nine Block?

THE COURT. I assume they are going to take an appeal from what I am doing. But what I am doing now so you may understand what is happening is that I am determining that the hearing that was held in March of 1980 was unconstitutional because you weren't allowed to have the witness that you called.

THE WITNESS. Okay.

THE COURT. So that means you get back your 150 days of good time, which means you have served your sentence as far as Walpole is concerned and you should be sent wherever they send you to serve your five years from-and-after. Where were you sentenced to?

THE WITNESS. To MCI Concord.

THE COURT. That's where you should go.

THE WITNESS. Is it possible to have a court order to have them ship me to MCI Concord within a certain period of time?

THE COURT. I can't order that. All I can do is address your constitutional rights.

THE WITNESS. Okay.

THE COURT. If they don't do that in a reasonable time, you ought to file a petition in court to have your release.

THE WITNESS. Can I say this? Can I say something?

THE COURT. Go ahead.

THE WITNESS. Although I got my good time back, they are not going to take me out of Nine Block or out of Walpole even though when they sentenced me, the court said "to be sentence' to Concord" after my Walpole sentence.

THE COURT. Well, as you know, the commissioner of corrections has the power to place a prisoner in any institution that he wants to.

THE WITNESS. Okay.

THE COURT. If they see fit to have you serve your time in Walpole, I would suppose they have that right to do that.

THE WITNESS. Well, the way they have me now, my condition being in solitary confinement or whatever —

THE COURT. They are going to have to start from scratch again.

THE WITNESS. So if that petition is knocked off, what I am saying is that there is my only way out of segregation.

THE COURT. No, no. They are going to have to come up with some reason in order to put you in solitary confinement in Walpole on your five-year on-and-after sentence. They have to have another hearing.

THE WITNESS. I see. They cannot keep me in there on the charges I am in there for now?

THE COURT. No, no. That is all gone. You are out of that. That is gone.

THE WITNESS. Okay. It's just I have had deals with the administration before and they try to go around that. As a matter of fact, I know an inmate that started a new sentence and they still kept him in segregation saying that that don't cut no ice.

THE COURT. I am just giving you some legal advice that that is unconstitutional, too. They have got to have a reason for segregating you from the general population because that is a deprivation of your right to liberty. In order to do that, they have got to give you notice of what you have done wrong, you have got to have a hearing, you have the right to a lawyer, you have the right to call witnesses and to cross-examine witnesses and you have the right to an appeal. And they have to go through that whole process within a reasonable period of time.

THE WITNESS. If they don't do it, is it possible to get a court order releasing me from segregation since I am no longer doing the Walpole sentence now?

THE COURT. I don't know where they are going to send you.

THE WITNESS. Well, outside of segregation.

THE COURT. They are supposed to release you from that sentence completely.

THE WITNESS. I realize that but from past experience, they don't do it.

THE COURT. If they don't, you can file a petition.

THE WITNESS. I have had deals with the administration before and they don't follow their own rules and regulations themselves.

MR. MARKS. Your Honor, I would like to ask a question. Wouldn't it make more sense to order the institution to have a hearing and comply with their regulations if you feel that they have not complied with the regulations rather than simply making a finding that these 150 days good time should be given back to the petitioner?

THE COURT. They have violated their own rules and regulations.

MR. MARKS. If you have made that finding, wouldn't it make more sense to send the case back and to order the institution to comply with its own rules and regulations?

THE COURT. When they have violated the Constitution of the United States?

MR. MARKS. When they have violated their own rules by apparently, as I understand the Court's feeling, not providing —

THE COURT. They violated the Constitution of the United States of America. Not only have they violated their own rules but they have violated the Constitution of the United States of America. Do you say they can get away with that? I don't think that is right. I really don't think it is right. And they did it knowingly and with malice aforethought. That is just not right.

MR. MARKS. Your Honor, I think you are making an assumption that they somehow concealed the witness or prevented him from attending. The facts simply have not been brought out. The witness may well have been ill or there may have been any number of reasons why the witness could not attend. You seem to have made the assumption that there was some evildoing on the part of the department of correction in preventing a witness from testifying to some exculpatory evidence to the petitioner when such was clearly not the case, your Honor, since the petitioner was convicted of manslaughter.

THE COURT. All I have is the testimony of a witness on the stand to the effect that he asked that a witness be brought to his hearing and they refused to allow it. That is what he testified to.

MR. MARKS. I think he also testified this witness was not there at an earlier hearing and they continued the hearing as a result of the non-attendance of the witness and then the witness did not attend the second hearing, he said.

THE COURT. Why?

MR. MARKS. I don't know and you don't know but you are making the assumption that the institution, when you talk about malice aforethought on the part of the institution —

THE COURT. Then all they have to do is come in and explain why. They haven't seen fit to show up here or have any witness here or to say anything about it. They don't care.

MR. MARKS. I don't think that is the case. It is not a question of not caring. I think it is a question of misunderstanding how these hearing were going to be held.

THE COURT. Why didn't somebody ask?

MR. MARKS. When a petition for habeas corpus is brought, I think the attorney general's office assumes there is going to be a petition for habeas corpus heard and not a petition for declaratory relief or a 1983 action.

THE COURT. This is not a 1983 action.

Will you please get my opinion in the other case and I will cite for the record the case I am relying on.

MR. MARKS. Your Honor, if I understood there was going to be a hearing, I certainly would have had this inmate's D report here and live witnesses, if I thought that was necessary after looking at his D report.

THE COURT. What did you think was going to happen? What did you think this was all about?

MR. MARKS. A petition for habeas corpus.

THE COURT. It was a petition for habeas corpus. That is exactly what it was. That is just what we heard, a petition for habeas corpus. That is what it was for. He wanted to get out of Walpole. That is what he said.

THE WITNESS. Can I just add that because the administration denied me Joseph Gaffney, I was sort of scared to go to my criminal trial and I was unrelaxed in going on with my criminal trial because of the lack of his statement.

THE COURT. In the case of Pina v. Superintendent of the Massachusetts Correctional Institution at Walpole, 376 Mass. 659 at 666, a 1978 case, they say, "The court, however, may construe a petition for writ of habeas corpus as a claim for declaratory relief." That is what it says. I can't see how such a misunderstanding could come up. We have had a number of hearings within the last two or three weeks and I have written an opinion in one of them. In two of the other cases, the superintendent, as I understand it, put the people back into general population and the issue became moot. We have had people taking the stand and testifying. I don't know how you could misconstrue this.

MR. MARKS. I was not present at any of those hearings, you Honor.

THE COURT. Somebody in the attorney general's office was.

THE WITNESS. Is it safe to say I am now doing my Concord sentence?

THE COURT. As soon as I get out the opinion and order.

THE WITNESS. Thank you.

This is to certify that I am an official court reporter in the Massachusetts Superior Court and that the foregoing volume constitutes a true and accurate transcript of my stenographic notes in the above-entitled matter taken at the time and place hereinbefore set forth.

/s/_____
Arthur E. Baker

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
NO. 136228

JOHN REAL
..... , Plaintiff(s)

vs.

JOSEPH PONTE
..... , Defendant(s)

JUDGMENT

This action came on for Hearing before the court, Mitchell, J. presiding, and the issues having been duly heard and findings having been duly rendered.

It is Ordered and Adjudged:

RESPONDENT PONTE SHALL RETURN THE PETITIONER TO THE GENERAL PRISON POPULATION

Dated at Dedham, Massachusetts, this 22nd day of June, 1982.

/s/ Robert L. Moscow
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
NO. 136228

JOHN REAL,
Petitioner,
V.
JOSEPH PONTE,
Respondent.

MOTION FOR STAY

Now comes Joseph Ponte, the respondent in the above-entitled action and respectfully requests a stay of this court's order of May 25, 1982 while an appeal is pursued. In support of this motion, the respondent states that a stay will (1) maintain the status quo, (2) not cause any hardship to the petitioner, and (3) be in the interest of justice.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By, /s/_____

Leo J. Cushing
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
NO. 136228

JOHN REAL,
Petitioner,
V.
JOSEPH PONTE,
Respondent.

NOTICE OF APPEAL

Now comes Joseph Ponte, the respondent in the above-entitled action and hereby gives notice of the filing of an appeal in this case.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By, /s/_____
Leo J. Cushing
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

COMMONWEALTH OF MASSACHUSETTS
THE APPEALS COURT

A.C.-82-0235-CV

JOHN REAL v JOSEPH PONTE

TRIAL COURT:
Norfolk Superior
NO.:
136228
NATURE OF CASE:
Motion for Stay

COUNSEL FOR PLAINTIFF
John Real (pro se)
M.C.I. Walpole
Box 100
South Walpole, MA 02071

COUNSEL FOR DEFENDANT
Leo J. Cushing, Asst. Atty. Gen.
One Ashburton Place
Boston, MA 02108
727-2240

1	Jun 29, 1982:	Fee waived (By the Court).
2	Jun 29, 1982:	Defendant/Petitioner's Motion for Stay, with Exhibits, and Certificate of Service, filed.
3	Jun 29, 1982:	Memorandum of Law in Support of paper #2, filed.
-	Jun 29, 1982:	Paper #1 "The judgment of the Superior Court is stayed pending a hearing on this motion" (Armstrong, J.). *Notice to counsel.
4	Jul 1, 1982:	Letter of Jul 1, 1982, from Asst. Atty. Gen. Cushing, requesting hearing, filed.
5	Jul 6, 1982:	Writ of Habeas Corpus Ad Testificandum issued, returnable before Armstrong, J., for Thu, Jul 8, 1982, 11:00 A.M., Room 1006.

COMMONWEALTH OF MASSACHUSETTS
THE APPEALS COURT

A.C.-82-837

JOSEPH REAL v JOSEPH PONTE

TRIAL COURT:	
Norfolk Superior	COUNSEL FOR PLAINTIFF
NO.:	John Real
136228	Box 100
NATURE OF CASE:	South Walpole, Mass.
Petition for Writ of Habeas Corpus	
Appeal by:	COUNSEL FOR DEFENDANT
Defendant	Leo J. Cushing, Asst. Atty. Gen.
Appellant:	Criminal Bureau
9-4-82	One Ashburton Place, Room 1805
Appellee:	J.W. McCormack Bldg.
10-4-82	Boston, MA 02108
	727-2240

1	Jul 26, 1982:	Entered.
2	Aug 4, 1982:	Appellant's Motion for access to Institutional Law Library Two Hours a day for Forty Days, filed.
3	Aug 4, 1982:	Appellant's Motion for enlargement of time pending Action by the Court on Motion for access to Institutional Law Library, with Certificate of Service, filed.
4	Aug 26, 1982:	Appellant's Motion to Enlarge time for filing brief to Sept. 30, 1982, with Certificate of Service, filed.

6	Jul 8, 1982:	Return of service re paper #5, filed.
-	Jul 8, 1982:	Hearing held before Armstrong, J.
7	Jul 8, 1982:	Appearance of Asst. Atty. Gen. Cushing, filed.
8	Jul 8, 1982:	Appearance of Mr. Real, filed.
9	Jul 19, 1982:	Letter of Jul 15, 1982, from John Real, enclosing papers, filed.
10	Aug 4, 1982:	ORDER-". . . The probabilities-hardship equation in this case seems to me to indicate that the judgment should be stayed pending appeal. . . . . The appeals both in this case and in 136442 (see note 1) should be treated as criminal appeals for purposes of scheduling argument" (Armstrong, J.). *Notice to counsel.
-	Aug 4, 1982:	Paper #9 "Motion to Amend Complaint- ". . . is denied without prejudice to raising the same matters before the superior court. This court does not have original jurisdiction with respect to the matters complained of" (Armstrong, J.)." "Motion for Law Library. . . ." . . . is denied without prejudice to raising the same matte rs before the superior court. This court does not have original jurisdiction with respect to the matters complained of" (Armstrong, J.)." *Notice to parties.
11	Aug 11, 1982:	Letter of Aug 10, 1982, to Asst. Clerk Mellen, from Asst. Atty. Gen. Cushing, enclosing copy of superior court order, filed.

Date: 10/16/84
A true copy,
ATTEST: /s/Ashley Brown Ahearn
Assistant Clerk

• - Sep 7, 1982:	Re: Paper #4-Allowed; By the Court. *Notice to Counsel.
• 5 Sep 3, 1982:	ORDER . . . "The motions filed by Mr. Real as papers #2 & 3 herein seem to be predicated on the motion that he is the appellant & is required to file a brief & appendix within 40 days. The Superior Court docket entries indicate that the Superintendent is the appellant. If Mr. Real should require an extension of time to file an appellee's brief, such an extension may be sought after the Superintendent's brief and appendix have been filed & served. We are informed that a motion for extra library time substantially like the one filed as #2 herein has been denied in the Superior Court. Mr. Real is not entitled as of right to have two courts consider the same motion on the same basis. He may pursue any appellate remedies he may have. The motions are denied. SEE ORDER ON FILE. By the Court. (Armstrong, J.). * Notice to Counsel.
6 Sep 8, 1982:	Letter dated 9/8/82 to John Real from Asst. Clerk Susan Mellen returning material, filed.
7 Sep 24, 1982:	Appellee's Motion for Appointment of Counsel, with Certificate of Service, filed.
8 Sep 30, 1982:	Appellant's Certificate Of Service (Brief & Appendix), filed.
9 Oct 14, 1982:	Appellee's Motion for Enlargement of Time to File Brief an Additional Thirty (30) Days with Certificate of Service, filed.

- Oct 21, 1982:	Re: Paper #9 - The time for the filing of Mr. Real's brief is extended to and incl. Nov 19, 1982. (Armstrong, J.). *Notice To Counsel.
10 Oct 26, 1982:	Letter dated 10/21/82 to Clerk, Appeals Court enclosing 7 copies of brief, with Certificate of Service and Requesting Writ of Habeas Corpus, filed.
- Oct 28, 1982:	Re: Paper #10 - Mr. Real's Brief (in 7 copies) is to be accepted for filing. His request for a Writ of Habeas Corpus is referred to the Senior Justice of the Panel designated to hear the appeal. The Clerk should direct the request to his attention not less than one week before argument (Armstrong, J.).
- Oct 28, 1982:	ORDER . . . of S.J.C. transferring case Sua Sponte, filed. *Notice to Counsel.

Date: October 17, 1984
A true copy
ATTEST: /s/ Warren L. Shield
Assistant Clerk

Supreme Judicial Court
for the Commonwealth of Massachusetts
S.J.C.-3006

JOHN REAL v
SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION, WALPOLE

A.C. No.: 82-837
TRIAL COURT:
Norfolk Superior Court

COUNSEL FOR PLAINTIFF - BRIEF I/W/C
John Real
Box 100
South Walpole 02071

NO.:
136228
NATURE OF CASE:
Petition for Writ
of Habeas Corpus
APPEAL BY: Defendant

COUNSEL FOR DEFENDANT
— BRIEF I/W/C

Michael B. Roitman, A.A.G.
Leo J. Cushing, A.A.G. (727-2240)
Criminal Bureau
1 Ashburton Place, Rm. 1805, Boston

ARGUED: 3-10-83
QUORUM: Submitted on Briefs 3/10/83 DECIDED 11/10/83
REHEARING: Denied 3/2/84 ALLOWED ☐
DENIED ☒

Sua Sponte 10-28-82

11/8/82 Entered.
7/27/83 Waiver of 130-Day Rule.
11/10/83 To the extent that the form of relief is wrong, the judgments are reversed and the case is remanded for an entry of judgment declaring the rights of the

plaintiff and ordering relief consistent with the principles set forth in the opinion. The defendant is to be given, on request, the right to convene a disciplinary board to conduct a new hearing on the same terms and conditions we describe in *Nelson* vs. *Commissioner of Correction*, Mass. , n.21 (1983).
Rescript November 10, 1983.
Reasons as on file.
Notice to counsel.
12/1/83 Defendant's Motion to Stay Rescript filed by Martin E. Levin, A.A.G. Circulated to Court.
12/2/83 Motion to Stay Rescript Allowed. Notice to counsel.
2-7-84. NOTICE of filing of Petition for Certiorari - U.S. Supreme Court. Forwarded to opinion author.
Petition for Rehearing No. 358.
3/2/84 Petition for Rehearing denied.
10-1-84. NOTICE FROM SUPREME COURT OF THE UNITED STATES: Certiorari granted Forwarded to opinion author.

A true copy
ATTEST: /s/ Frederick Quinlan
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 137791

JOHN REAL
..... , *Plaintiff(s)*

v.

JOSEPH PONTE
..... , *Defendant(s)*

RECEIVED MAR 9 1983 — Department of Attorney General

REVISED JUDGMENT

This action came on for (trial) before the court, Zobel, J. presiding, and the issues having been duly (heard) and findings having been duly rendered,

It is Orderd and Adjudged:

Defendant shall forthwith credit Plaintiff with 150 days' good time forfeited in proceedings resulted from Disciplinary Report No. 81-4065

Dated at Dedham, Massachusetts, this Third day of March, 1983.

/s/ M.A. Podolski
Assistant Clerk

A True Copy
Attest /s/ Mary K. Hickey
Deputy Assistant Clerk
March 3, 1983

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, ss. SUPERIOR COURT
CIVIL NO. 137791

JOHN REAL
Plaintiff,

V. MOTION FOR STAY

JOSEPH PONTE, Superintendent,
M.C.I., Walpole,
Defendant.

Now comes the defendant and moves for a stay of the Revised Judgment entered in this case on March 3, 1983.

As grounds therefore, defendant states that the Revised Judgment was predicated on the judgment of Mitchell, J., entered in *Real* v. *Ponte*, Norfolk, ss., Civil No. 136228, on June 22, 1982. The judgment in No. 136228 is now on appeal to the Massachusetts Supreme Judicial Court, *Real* v. *Ponte*, SJC-3006. Because the merits of the parties' claims are already before the Supreme Judicial Court, rendering further appellate action duplicative,[1] and because the outcome of SJC-3006 will necessarily affect this court's Revised Judgment, defendant

[1] Although the judgment in this action may be appealable on purely procedural grounds, *see* Wright and Miller, Federal Practice and Procedure § 2873, Smith and Zobel, 8 Massachusetts Practice § 60.3 (setting forth procedure for obtaining relief pursuant to Rule 60 while an appeal is pending), defendant seeks to preclude the need for filing such an appeal since the merits underlying this action are already before the S.J.C.

respectfully submits that the Revised Judgment be stayed pending the decision in SJC-3006.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By, /s/ _____

Martin E. Levin
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

Dated: March 16, 1983

NORFOLK, ss—SUPERIOR COURT No. 137791

JOHN REAL vs. JOS. PONTE

re: Mo. for stay, allowed. (Zobel, J.) 4-1-83

Dedham, 4-4-83 Nicholas Barbadoro CLERK
Received Apr 8 1983 Department of Attorney General

RESPONDENT'S

BRIEF

FILED
DEC 10 1984

No. 83-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH POTTS, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE

Petitioner,

v.

JOHN REAL,

Respondent.

On Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

---

BRIEF OF RESPONDENT

JONATHAN SHAPIRO
STERN & SHAPIRO
60 Boylston Street
Boston, Massachusetts 02116
(617) 542-0660

PRESS OF BAR PRINTING, WESTWOOD, MA 02090 (617) 326-0202

QUESTIONS PRESENTED

1. Whether this case is moot because Respondent has served the good time at issue and the outcome will not affect the rights of the parties?

2. Whether the refusal of the prison authorities to call witnesses requested by Respondent to testify in his defense at a prison disciplinary hearing was arbitrary in violation of Respondent's right to due process of law?

3. Whether the Constitution requires that there be some support in the administrative record of a disciplinary hearing for a refusal of prison authorities to call witnesses requested by an inmate to testify in his behalf?

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STATEMENT OF THE CASE

A. Facts.

The facts are undisputed and appear in the pleadings, the testimony of the Respondent inmate John Real ("Real") at an evidentiary hearing on his petition for writ of habeas corpus, and the findings of fact of the trial court.[1] On December 24, 1991, an inmate attacked a correctional officer in a prison industries office at the Massachusetts Correctional Institution, Walpole ("M.C.I. Walpole"). While an industries supervisor, John Baleyko, tried to separate the inmate and the officer, a number of inmates who were in the adjacent metal shop, including Real, came into the office to observe what was happening. J.A. 13a. When Baleyko saw these inmates he told them to leave. Real, however, continued to watch the fight, and Baleyko told him to leave or he would be charged with disobeying an order. As Real began to leave he was stopped by a correctional officer who searched and questioned him. A few minutes later Baleyko, after noticing that Real was still in the office, ordered that he be locked in his cell. When Real tried to explain that he had not been able to leave because he had been stopped by an off. ~, another officer ordered that he be locked up. J.A. 9a-9b.

Real was first locked in his cell, he was later placed in the segregation unit at M.C.I. Walpole, and still later he was transferred to another prison, M.C.I. Norfolk. Appendix to Petition for Certiorari ("Cert. Pet. App.") C 2-3. Real received a disciplinary report (No. 91-4065) prepared by Baleyko charging him with three offenses arising out of the December 24th incident: #1—disobeying an order; #8—conduct which disrupts; and #14—participating in or encouraging a riot, work

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[1] Although Petitioner moved to dismiss the petition on the ground that it was "improvidently filed," he did not file any response denying the allegations of the petition or of the amended complaint. J.A. 19a. At the evidentiary hearing on the petition, moreover, Real's testimony was not disputed and Petitioner did not present any testimony or documentary evidence. J.A. 25a-35a.

stoppage, hostage taking or unauthorized group demonstration. J.A. 12a.[1] On a form provided by the prison Real requested representation at his disciplinary hearing by a Northeastern University Law School student, and requested that four witnesses be produced at the hearing. He wrote:

> On Deresport [sic] No. 814065 I like to have for witnesses inmate Dale LaTaille. And inmate Robert Thayer. And the Reporting officer John Balayko and the officer Rich who got hurt that day mention in D-Report No. #814065.

J.A. 16a. According to Real, both inmates had been present in the metal shop at the time of the incident, and the officer was the one involved in the fight. J.A. 11a.

A hearing was conducted before an institutional disciplinary board composed of three Department of Corrections personnel at M.C.I. Norfolk on February 10, 1982.[2] Real was represented by a law student and pleaded not guilty. Cert. Pet. App. C 3. Although Balayko, the reporting officer, appeared and testified against Real, the board refused to call as witnesses the two inmates and the one correctional officer requested by Real. Cert. Pet. App. C 4; J.A. 14a.[3] No reason was given or otherwise appears in the record of the hearing for the refusal.

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[1] 103 Code Mass. Regs. § 430.22 (1979) which is set out in its entirety at pp. A7-A11 of the Statutory Appendix to Petitioner's Brief, contains 31 separately numbered offenses, and provides in pertinent part:

> Disciplinary offenses shall include the following acts:
>
> (1) Disobeying an order of, lying to, or insolence to a staff member.
>
> (8) Conduct which disrupts or interferes with the security or orderly running of the institution.
>
> (14) Participation in or encouraging a riot, work stoppage, hostage taking, or unauthorized group demonstration.

[2] 103 Code Mass. Regs. 430.07(2) (1979) provides, in pertinent part:

> The superintendent shall appoint a disciplinary board made up of three members, one of whom shall be designated by him as chairman.

[3] For the full text of 103 Code Mass. Regs. § 430.14: *Fact Finding Aspects of Hearing Before Disciplinary Board*, (1979), see Cert. Pet.

Real testified at the hearing that he was trying to obey Balayko's order but was stopped and "shaken down" by another officer who had responded to the alarm. J.A. 13a, 14a. The disciplinary board found Real guilty of each of the offenses charged. J.A. 15a. It concluded that he was guilty of disobeying an order (offense #1) because he "was ordered a number of times before he attempted to comply," that he had engaged in conduct which disrupts the orderly running of the institution (offense #8) "[i]n view of the incident and violations of code #1," and that "[i]n view of the seriousness and explosive situation he did participate/encourage to a riotous [sic] condition" (offense #14). J.A. 15a. It imposed a sanction of 15 days isolation for offenses #8 and #14.[4] It also recommended 200 days loss of good time (LGT)[5] and transfer to the departmental segregation unit (DSU) for offenses #8 and #14.[6] J.A. 14a.

App. D 1-5. The inmate is entitled to have the reporting officer attend the hearing, and he is entitled to question the reporting officer and call witnesses in his defense. *Id.* at §§ 430.14(4) and (6).

[4] "The superintendent of a correctional institution may, for the enforcement of discipline, confine an inmate to an isolation unit for a period not to exceed 15 days for any one offense. Mass. Gen. Laws Ann. ch. 127, § 40 (West 1974); 103 Code Mass. Regs. § 430.22(31)(a) (1979). The inmate may be placed in isolation only pursuant to a sanction imposed by a disciplinary board. 103 Code Mass. Regs. § 430.20(1).

[5] Because Real's maximum sentence exceeded four years, he was entitled to have the maximum term of imprisonment reduced by 12½ days for each month of the sentence if his "record of conduct shows that he has faithfully observed all the rules of his place of confinement, and has not been subjected to punishment." Mass. Gen. Laws Ann. ch.127, § 129 (West 1974). The commissioner of correction has the authority, upon the recommendation and evidence submitted in writing by the superintendent, to decide what part, if any, of the good conduct deductions of a prisoner in a state correctional institution shall be forfeited for a violation of a rule of the institution. *Id.*

[6] "The commissioner of correction may, at the request of the superintendent of a correctional institution, authorize the transfer to a segregated unit of the institution of "any inmate whose continued retention in the general institution is detrimental to the program of

Immediately after the hearing Real was placed in the institutional disciplinary unit ("IDU") at M.C.I. Walpole. Cert. Pet. App. A 12. Pursuant to an appeal filed by Real, the Superintendent reduced the recommended loss of good time to 150 days. J.A. 17a.

B. Prior Proceedings.

On April 9, 1982, Real commenced this action by filing a *pro se* petition for a writ of habeas corpus against Petitioner Joseph Ponte, the Superintendent of M.C.I. Walpole, (the "Superintendent") in Norfolk County Superior Court. J.A. 1a, 2a. In this petition he challenged the constitutionality of the conditions under which he was then being held in the IDU and he sought the return of the privileges of which he had been deprived. J.A. 6a-7a. He filed a second *pro se* petition on May 5, 1982, which the court treated as an amended complaint. J.A. 6a. He alleged that the February 10, 1982, disciplinary hearing had violated his right to due process, he sought immediate release from the IDU, and he requested that the disciplinary conviction be expunged. J.A. 12a.

At the hearing on the petition in the Superior Court on May 25, 1982, Real testified that he had requested two inmate witnesses for his disciplinary hearing but that the board had refused to call them. J.A. 23a-24a.[4] Although the Superintendent was represented at the hearing by an assistant attorney general, neither he nor any other prison official testified or presented any other evidence as to the basis for the disciplinary board's denial of Real's request for witnesses. When the assistant attorney general was unable to provide any explanation for the denial, the court commented:

> THE COURT: Then all they have to do is come in and explain why. They haven't seen fit to show up here or have any witness here or to say anything about it. They don't care.

J.A. 33a.[5]

Treating the petition as a claim for declaratory relief, the court stated:

> No evidence was presented by [the Superintendent] indicating the reason why [Real's] request to call two inmates as witnesses in his defense was denied. Thus I find [Real's] due process right to call witnesses and present evidence was arbitrarily denied by the Board.

Cert. Pet. App. C 10 (emphasis in original). On June 22, 1982, the court ordered that Real be returned to the general prison population on the ground that his placement in the IDU had been based upon his unconstitutional conviction of a disciplinary offense, J.A. 36a; Cert. Pet. App. C 13, and it ordered that his good time credit be restored. J.A. 46a.[6] The Superintendent filed a notice of appeal and moved for a stay of the judgment, which was granted by the Appeals Court on June 29, 1982. J.A. 37a, 38a. The Supreme Judicial Court of the

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the institution." Mass. Gen. Laws Ann. ch.127, § 39 (West 1974). Before authorizing such a transfer at the request of the superintendent a reclassification hearing must be conducted and the commissioner must make a finding that "(a) the resident poses a substantial threat to the safety of others; or (b) The resident poses a substantial threat of damaging or destroying property; or (c) The resident poses a substantial threat of interrupting the operation of the state correctional facility if he is confined in the general population of any state correctional facility." 103 Code Mass. Regs. § 421.07 (1979).

[4] Real appeared *pro se* at this hearing and was questioned by the court. J.A. 23a.

[5] Although the assistant attorney general sought to explain this because of his "misunderstanding how these hearings were going to be held," J.A. 33a, he did not seek a continuance for the purpose of presenting witnesses to explain the disciplinary board's action nor did he seek reconsideration of the judgment on the ground that he had been denied an opportunity to present witnesses.

[6] As a result of an oversight the order restoring Real's good time credit was not entered until March 3, 1983, while the case was pending on appeal before the Supreme Judicial Court. J.A. 46a. See Brief of Petitioner ("Pet.'s Br.") 7 n.3. This judgment was stayed pending the appeal. J.A. 47a-48a.

Commonwealth granted direct appellate review of the Superior Court judgment sua sponte. J.A. 45a.[7]

On November 10, 1982, the Supreme Judicial Court reversed that part of the lower court's judgment which returned Real to the general prison population on the ground that his transfer, even if a consequence of a tainted disciplinary hearing, did not infringe upon a liberty interest protected by the Fourteenth Amendment to the United States Constitution. Cert. Pet. App. A 25. It affirmed, however, the restoration of Real's good time credit on the ground that his right to call witnesses to testify in his defense had been violated. *Id.* 21-22.[8]

C. Facts Relating To Mootness.

The Superintendent has brought to the Court's attention the fact that Real was paroled from M.C.I. Walpole on October 31, 1984, and is no longer in the custody of the Massachusetts Department of Correction.[9] He suggests that Real's release on parole does not render this case moot. Pet's Br. 4-5 n.1.

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[7] Real was not represented by counsel at any stage of the judicial proceedings in this case. All of the pleadings and his brief in the Supreme Judicial Court were handwritten by him. In its opinion the court noted that "with considerable difficulty, we identify and discuss the issues that seem to us both preserved and substantial." Cert. Pet. App. A 1-2 n.2.

[8] The stay of the judgment ordering the restoration of Real's good time has been continued pending the disposition of the case in this Court. J.A. 44a, 45a. As we point out at pp. 10-11, *infra*, however, Real has already served the sentence from which this good time was withheld.

[9] Real was granted parole by the Massachusetts Parole Board effective October 31, 1984. On that date he was released to officers of the United States Immigration and Naturalization Service (INS) pursuant to a detainer that had been lodged against him as a result of deportation proceedings pending against him. Real has been released by INS on bail.

Additional facts, however, have a bearing upon considerations of mootness. On June 14, 1979, Real was sentenced to a term of three to five years at M.C.I. Walpole. J.A. 9a.[10] His good conduct release date as of that date was January 3, 1982.[11] While serving this sentence Real lost good time credit for two disciplinary infractions that are unrelated to the present case. He lost 60 days of good time as a sanction for disciplinary infractions committed on September 27, 1979, and he lost 150 days of good time after being found guilty of killing another inmate in the course of a fight which took place on February 2, 1980. The effect of these losses of good time, totalling 210 days, was to move Real's good conduct discharge date from January 3, 1982 to July 31, 1982. When he lost an additional 150 days of good time as a result of the disciplinary sanction in the present case, his good conduct discharge date became December 29, 1982.[12]

Real was convicted of manslaughter in Norfolk County Superior Court on October 22, 1965, on the basis of the same incident for which he had lost 150 days of good time, and he was sentenced to five years imprisonment at M.C.I. Concord, to

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[10] Because Real was credited with 161 days of jail time prior to his conviction the sentence was effective as of January 18, 1979. See Department of Correction Master Card containing the record of Real's sentences, commitments and releases, reproduced in the Appendix at 1a *infra*.

[11] Pursuant to Mass. Gen. Laws Ann. ch. 127, § 129 (West 1974), Real was entitled to a good conduct deduction of 12½ days per month. The total projected number of good conduct deductions is computed at the time an inmate begins to serve his sentence and a good conduct release date is established at the outset of the prison term. *Commonwealth v. Rogers*, 17 Mass. App. 168, 169 n.3 (1983). Thus, Real's maximum discharge date of January 18, 1984, was reduced by 720 days (12½ x 60 months) to establish the good conduct release date of January 3, 1982.

[12] See Department of Correction Forfeiture of Good Time cards reproduced in the Appendix at 2a, 3a, *infra*.

run from and after the Walpole sentence he was then serving." Because this sentence was imposed for an offense committed during his term of imprisonment, Real was not entitled to receive any good conduct deductions.[8]

Real filed another *pro se* petition, not at issue here, against the Superintendent on May 4, 1992, in which he sought the restoration of the 150 days of good time he had lost as a result of the disciplinary hearing for the homicide. J.A. 27a. In this petition he alleged that the hearing on March 28, 1990, had violated his right to due process of law because of the disciplinary board's refusal to call as a witness a correctional officer requested by Real who would have testified "about some self-defense background of the case." J.A. 27a.[9] The

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[7] *See* Appendix at 1a, *infra*. The designation of the sentence as a "Concord" sentence only affects statutory parole eligibility. Under such a sentence a person is eligible for parole at any time. Mass. Gen. Laws Ann. ch. 127, § 133 (West 1974), while the parole eligibility of a person sentenced to Walpole is either one-third or two-thirds of the minimum sentence. *Id.* The Commissioner of Correction, however, has the authority to designate the institution at which the inmate will serve either type of sentence. J.A. 30a-31a; Mass. Gen. Laws Ann. ch. 124, § 1(g).

[8] Mass. Gen. Laws Ann. ch. 127, § 129, reproduced in Appendix to Pet'n Br. A 2, provides in pertinent part:

> If, during the term of imprisonment of a prisoner confined in a correctional institution of the commonwealth, such prisoner shall commit any offense of which he shall be convicted and sentenced, he shall not be entitled to any deductions hereunder from the new sentence or sentences of imprisonment.

[9] At the hearing below, J.A. 27a, Real testified in response to questions by the court as follows:

> Q. You state here, "Petitioner on March 28, 1990, was denied due process rights of a fair and proper hearing at a disciplinary hearing in front of board members Dell'russo, Balako and Flynn and was denied an important witness, who was Correctional Officer Joseph Gaffney."
>
> A. Right.
>
> Q. How did that come up? Why were you before a disciplinary board on March 28, 1990?

hearing in Superior Court on May 25, 1992, related to this petition, as well as to the petition in the instant case in which Real challenged the constitutionality of the February 10, 1992, disciplinary hearing. J.A. 20a-21a.[10]

At the conclusion of the hearing the court ruled that the March, 1990, disciplinary hearing was unconstitutional because of the board's refusal to call the witness Real requested and that he was entitled to restoration of the good time he had lost at that time. J.A. 29a-30a.[11] In its Findings, Rulings and Order, entered on June 16, 1992, in which it concluded that Real's rights had also been violated at the February 10, 1992,

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> A. On February 8, there was an incident down the gymnasium at MCI Walpole where an inmate was killed and I was taken out of population and brought to Ten Block. And me and my lawyer was at the disciplinary hearing and we continued the disciplinary hearing and we requested witnesses, Joseph Gaffney and Frank Bartlett.
>
> Q. Okay.
>
> A. So that was our right in requesting a witness to be there because it was an important issue. It was for a case in court. So comes the hearing on the 28th and we got Officer Frank Bartlett for a witness but we didn't get Officer Joseph Gaffney for a witness, which he was an important witness because he made a few statements about some self-defense background of the case.

[10] The caption page of the transcript indicates that the hearing was on two civil actions numbered 136229 and 126442 [this should be 136442]. J.A. 20a. The clerk only announced No. 126442 on the record at the beginning of the hearing. J.A. 21a. Civil Action No. 136229 involved the February 10, 1992, disciplinary hearing on disciplinary report No. 81-4065 at which Real was found guilty of disobeying an order, conduct which disrupts, and participating in a riot. J.A. 1a, 8a. Civil Action No. 136442 involved the March 28, 1990, disciplinary hearing at which Real was found guilty of killing another inmate. J.A. 27a, 29a-30a. In its opinion the Supreme Judicial Court noted that both of these actions were heard together on the merits on May 25, 1992. Cert. Pet. App. A 4.

[11] A judgment in Civil Action No. 136442 ordering the restoration of this 150 days was entered on June 22, 1992, along with the court's formal Findings, Rulings and Order on Petitioner's Writ of Habeas Corpus. *See* Appendix at 4a, 5a-7a, *infra*.

disciplinary hearing, the court only ordered that Real be returned to general population and, inexplicably, did not order that he be credited with the 150 days good time which he had lost as a result of this hearing. Cert. Pet. App. C 13-14.[8] The Superintendent appealed from the judgment ordering the restoration of the 150 days good time in Civil Action No. 136442 (involving the March, 1980, disciplinary hearing) as well as from the judgment ordering that Real be returned to the general prison population in Civil Action No. 136228 (involving the February, 1982, disciplinary hearing), and stays pending appeal were sought in the Massachusetts Appeals Court. Cert. Pet. App. B 2-3 n.1. The Appeals Court granted a stay of the judgment ordering that Real be returned to general population but it denied a stay with respect to the restoration of the good time relating to the March, 1980, hearing. *Id.*

Although the Superior Court had held that Real's due process rights had been violated in each of the two disciplinary hearings because of the arbitrary refusal of the prison authorities to call the witnesses he had requested, J.A. 29a-30a; Cert. Pet. App. C 10, the Superintendent only perfected his appeal in this case relating to the February, 1982, disciplinary hearing (No. 136228). In the case involving the March, 1980, disciplinary hearing (No. 136442) he has not pursued the appeal and he has in fact credited Real with the 150 days of lost good time.[9]

As a result of the Superintendent's acquiescence in the restoration of the 150 days good time in No. 136442, Real's good conduct discharge date was moved forward to July 31, 1982. He was credited with an additional 12½ days of earned good time,[10] and he was granted a Certificate of Discharge from

[8] This apparent oversight was corrected with the entry of a Revised Judgment on March 8, 1983. J.A. 46a.

[9] *See* Department of Correction Restoration of Good Time card reproduced in the Appendix at 8a, *infra*.

[10] *See* Department of Correction "Deduction from Sentence" Summary Sheet reproduced in the Appendix at 9a, *infra*. MASS. GEN. LAWS ANN. ch. 127, § 129, provides:

his 3-5 years Walpole sentence effective July 19, 1982.[11] As of that date, therefore, Real was discharged from his Walpole sentence and he began serving the consecutive five year Concord sentence on which, because he is not entitled to any good time deductions, he has a discharge date of July 18, 1987. *See* Pet's Br. 4-5 n.1.

Since Real has been finally discharged from the 3-5 years Walpole sentence, a determination that he is entitled to a restoration of the good time deductions he lost as a result of the February, 1982, disciplinary hearing will be of no consequence. The restoration of the deductions cannot undo the fact that he has already served the time and has been discharged from the sentence. Moreover, there is a statutory prohibition against the reduction of the five year Concord sentence to which he is presently subject by any good time credit. MASS. GEN. LAWS ANN. ch. 127, § 129. Therefore, contrary to the Superintendent's assertion, Pet's Br. 4-5 n.1, the restoration or withholding of the 150 days good time at issue in the present case will not have any effect upon Real's ultimate release date.

SUMMARY OF ARGUMENT

I. The exercise of Article III jurisdiction by this Court depends upon the existence of a "live" controversy between the parties where the injury suffered can be redressed by a favorable judgment. The lack of such a legally cognizable in-

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> "[T]he commissioner may grant, . . . a further deduction of sentence of not more than two and one-half days for each month while said prisoner is partaking in any [activity which the superintendent of the institution shall deem valuable to said prisoner's rehabilitation . . .]"

[11] See Appendix at 10a, *infra*. MASS. GEN. LAWS ANN. ch. 127, § 129 provides in pertinent part:

> A prisoner in a correctional institution of the commonwealth who is entitled to have the term of his imprisonment reduced shall receive from the commissioner of correction a certificate of discharge and shall be released from the correctional institution in which he has been confined, upon the date which has been determined by such deductions from the maximum term of his sentence or sentences.

terest in the outcome by either of the parties makes the present case moot.

Since Real has already served the good time at issue and has been unconditionally discharged from the sentence from which it was withheld by the prison authorities, a decision affirming or reversing the Massachusetts Supreme Judicial Court's order that it be restored will have no affect upon the rights of the parties. As in *Murphy* v. *Hunt*, 455 U.S. 478 (1982) and *Lane* v. *Williams*, 455 U.S. 624 (1982), once the custody which gave rise to the constitutional violation ended the case became moot. There are no "collateral effects" of a loss of good time such as would warrant an exercise of federal jurisdiction. Nor is the exception to the mootness rule for that category of harm that is "capable of repetition, yet evading review" applicable. There is ordinarily a sufficient opportunity to litigate questions concerning the deprivation of good time since the injury occurs long after the challenged disciplinary hearing. Furthermore, there is no "reasonable expectation" that Real, who has been released on parole, will be subjected to the same constitutional harm in the future.

IIA. The right of a prison inmate to present witnesses in his defense at a prison disciplinary hearing, although circumscribed by legitimate correctional and institutional considerations, is a fundamental element of due process of law guaranteed by the Fourteenth Amendment. While prison officials have considerable discretion in their administration of prison discipline, the arbitrary refusal to permit witnesses to testify constitutes a violation of this right which can and should be redressed by the courts.

Real established that his timely request for relevant witnesses to testify at his disciplinary hearing was denied by the disciplinary board without explanation. In the absence of any showing by the prison authorities at the hearing below that the denial of those witnesses was based upon legitimate correctional or institutional considerations, the trial court was warranted in finding that the denial was arbitrary.

B. The Supreme Judicial Court's requirement that there be some support in the administrative record for a disciplinary board's denial of an inmate's request for witnesses represents a reasonable accommodation of the interests of the inmate with those of the prison authorities. It reduces the risk of arbitrary interference with an inmate's important right to present a defense at a disciplinary hearing and it provides for more effective enforcement of that right in the courts. It is in accord with the policies and recommendations of reputable authorities in the areas of correctional administration and criminal justice and the Superintendent's claims that it will threaten institutional security and otherwise burden prison administration are speculative and unrealistic. Indeed, the requirement that there be record support for the refusal to call witnesses appropriately recognizes and defers to the role of the prison authorities and will minimize the intrusion of courts into prison administration.

I

THE CASE IS MOOT BECAUSE ITS OUTCOME WILL HAVE NO AFFECT UPON THE RIGHTS OF THE PARTIES.

The exercise of judicial power under Article III of the Constitution by federal courts depends on the existence of a case or controversy. *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). To satisfy this requirement, "a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Society* v. *Heckler*, 104 S.Ct. 373, 374-375 (1983). As this Court noted in *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), federal courts have neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Their judgments must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937).

A case becomes moot and a federal court loses Article III jurisdiction " 'when the issues presented are no longer "live" or

the parties lack a legally cognizable interest in the outcome.'" *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980), quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). The "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). Moreover, even in cases arising in state courts which have chosen to adjudicate a matter because of its public importance and the desirability of a statewide decision, this Court is "limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties." *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974); *see also DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974).

Under these principles, there no longer exists a "live" controversy between the parties in the present case. Since Real has already served the 150 days of "good time" that are at issue here and he has been finally discharged from the only sentence on which he was entitled to good conduct deductions, a final judgment restoring or withholding credit for the 150 days will be of only academic interest to the litigants. Although Real did suffer an actual injury by virtue of his having served the 150 days of which the courts below found he had been unconstitutionally deprived, the injury no longer "can be redressed by a favorable judicial decision." *Iron Arrow Honor Society* v. *Heckler*, 104 S.Ct. at 373.

In this regard, Real is in the same position as the party whose case this Court held to be moot in *Murphy* v. *Hunt*, 455 U.S. 478 (1982). Hunt, a criminal defendant charged with violent sexual crimes who had been denied bail while awaiting trial, challenged in federal court the constitutionality of a provision of the state constitution which limited bail in such cases. Although the Court of Appeals for the Eighth Circuit agreed with Hunt's contention, this Court held that the case became moot when Hunt was convicted of the offenses and no longer had any claim to pretrial bail. The Court concluded that:

> The question was no longer live because even a favorable decision on it would not have entitled Hunt to bail. For the same reason, Hunt no longer had a legally cognizable

> interest in the result in the case. He had not prayed for damages nor had he sought to represent a class of pretrial detainees.

Id. at 481-482.

Even though Real, unlike Hunt, was imprisoned for a period of time arguably in violation of his constitutional rights, the controversy here is equally moot. Since Real has not sued for damages or class relief and even a favorable decision will have no effect on the length of his sentence, he has no "legally cognizable interest" in the outcome. Similarly, the length of Real's from and after five year Concord sentence will be as unaffected by a determination of his entitlement to good time on a sentence from which he has been discharged as Hunt's post-conviction custody would have been unaffected by a decision relating to pretrial bail.

Lane v. *Williams*, 455 U.S. 624 (1982), is also on point. Two defendants had pleaded guilty in state court to offenses punishable by an indeterminate term of years and a mandatory three-year parole term. In each case, the defendant was released on parole, but was later returned to prison as a parole violator. In petitions for writs of habeas corpus, they claimed that their incarceration as a result of a violation of that parole term violated the due process clause of the Fourteenth Amendment because they had not been informed of the mandatory parole term at the time they had negotiated their guilty pleas. By the time the case had reached the Court of Appeals for the Seventh Circuit, which affirmed the District Court's order declaring the mandatory parole term void, both defendants had been discharged from custody and from all supervision flowing from their prison sentences and mandatory parole terms.

In holding that the cases were moot, the Court explained that the defendants had:

> sought to remedy the alleged constitutional violation by removing the consequence that gave rise to the constitutional harm. In the course of their attack, that consequence expired of its own accord. Respondents are no longer subject to any direct restraint as a result of the

parole term. They may not be imprisoned on the lesser showing needed to establish a parole violation than to prove a criminal offense. Their liberty or freedom of movement is not in any way curtailed by a parole term that has expired.

Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot. "Nullification of a conviction may have important benefits for a defendant . . . but urging in a habeas corpus proceeding the correction of a sentence already served is another matter." *North Carolina* v. *Rice*, 404 U.S. 244, 248.

Id. at 631.

Since Real also only attacked the length of his sentence, the case became moot when that sentence expired and he received an unconditional certificate of discharge. For all intents and purposes, Real is in the same position as the defendants in *Lane* in that "the consequences that gave rise to the constitutional harm" have expired and he can in no way be affected by a decision on the merits of his claim. *See also Weinstein* v. *Bradford*, 423 U.S. 147, 148 (1975) (prisoner's claim that he was constitutionally entitled to procedural rights in the consideration of his application for parole was moot because, after being paroled and later released from all supervision, he "can have no interest whatever in the procedures followed by petitioners in granting parole."); *North Carolina* v. *Rice*, 404 U.S. 244, 248 (1971) (defendant's challenge to an increased sentence imposed after a trial de novo remanded for consideration of the question of mootness because his only claim related to a sentence he had completely served).

Unlike a criminal conviction, moreover, the deprivation of good time will have no "collateral effects" such as would keep a controversy "live" and warrant an exercise of federal jurisdiction. *Cf. Carafas* v. *LaVallee*, 391 U.S. 234, 237-238 (1968). In *Lane* v. *Williams*, 455 U.S. at 632, this Court held that a finding of a parole violation, which did not carry with it any of the civil disabilities which ordinarily accompany a criminal conviction, would not prevent the case from being considered moot after the discharge of the defendant from his sentence.

There are even fewer consequences flowing from a prisoner's loss of good time. After release the record of an individual's prison discipline will be accessible only to the prison authorities, in contrast to a record of a parole violation which will generally be part of an individual's criminal record and available to law enforcement authorities and judges. Thus, while a record of a parole violation may be considered by a judge in setting bail or sentencing in the future, and by parole authorities in connection with a future application for parole, *see, e.g. Lane* v. *Williams*, 455 U.S. at 637-640 (Marshall, J., dissenting opinion), it is difficult to conceive of any remotely comparable effects flowing from a disciplinary sanction. Certainly, the possibility that Real may be returned to prison in the future and that this sanction will be used as a basis for enhancing a sanction resulting from an infraction which he might commit in the future is far too speculative and remote "to establish the existence of a present, live controversy." *Cf. Ashcraft* v. *Mattis*, 431 U.S. 171, 172-173 n.2 (1977). *See also Preiser* v. *Newkirk*, 422 U.S. 396, 403 (1975) (the possibility that a challenged transfer of a prison inmate from one institution to another might affect good time or parole decisions was not of sufficient immediacy and reality to warrant the issuance of a declaratory judgment).

Finally, this case does not fall within the exception to the mootness rule for that category of harm that is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). In the absence of a class action, this doctrine is limited "to the situation where two elements combine[]: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. at 149.

Neither of these two requirements are satisfied in the present case. In the first place, there is ordinarily more than sufficient time to litigate questions concerning the deprivation of good time since the injury only occurs at the end of a

prisoner's sentence, which is often years after the challenged disciplinary hearing. *See, e.g., Wolff* v. *McDonnell*, 418 U.S. 539, 561 (1974); *Preiser* v. *Rodriguez*, 411 U.S. 475, 495-496 (1973). What this Court said in *DeFunis* v. *Odegaard*, 416 U.S. at 319, is equally true here:

> [T]here is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the [Supreme Judicial Court of Massachusetts] has spoken.

In addition, a court has the power to insure that a case involving a loss of good time does not become moot by releasing or admitting to bail an inmate who is serving the disputed good time. *See Rodriguez* v. *McGinnis*, 451 F.2d 730 (2nd Cir. 1971) *rev'd on other grounds*, 456 F.2d 79 (1972) (en banc).

Secondly, it cannot be said that there is "a reasonable expectation" that Real, who has now been released from custody on parole, will be subjected to the same constitutional harm in the future. While the prison authorities "will continue to administer the [Massachusetts prison] system with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that [Real] will again be among that number." *Weinstein* v. *Bradford*, 423 U.S. at 149.

This Court has rejected the notion that "a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*." *Murphy* v. *Hunt*, 455 U.S. at 482. Even in the case of parties who anticipated violating lawful criminal statutes and being tried for their offenses, this Court held that the threat was not "sufficiently real and immediate to show an existing controversy." *O'Shea* v. *Littleton*, 414 U.S. 488, 496 (1974). Indeed, in *Preiser* v. *Newkirk*, 422 U.S. at 402-403, the Court held that a prison inmate's challenge to his transfer to another prison without procedural safeguards became moot when he was returned to the original institution, even though he remained subject to being transferred again.

> Any subjective fear Newkirk might have entertained of being again transferred, under circumstances similar to those alleged in the complaint, or of suffering adverse consequences as a result of the 1972 transfer, is indeed remote and speculative and hardly casts that "continuing and brooding presence" over him that concerned the Court in *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974).

The possibility that Real will violate his parole, be returned to prison, commit a disciplinary infraction, and be arbitrarily denied witnesses requested by him at the disciplinary hearing is considerably more remote and speculative than the possibility of a transfer in *Newkirk* or of the anticipated arrests and prosecutions in *O'Shea*. In this sense, Real clearly lacks the "personal stake in the outcome" of this case necessary for the proper resolution of constitutional questions. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

II

THE REFUSAL OF THE DISCIPLINARY BOARD TO CALL WITNESSES REQUESTED BY REAL VIOLATED HIS RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Real's *pro se* petition for writ of habeas corpus in the present case did not challenge the constitutionality of any Department of Correction regulations, and the trial court did not address this issue. Rather, the trial court decided only that Real's right to due process had been violated by the refusal of the disciplinary board to call the witnesses he requested. Although the court recognized that an inmate's right to call witnesses was limited and that a request could be denied where it would jeopardize institutional safety or correctional goals, it also recognized that "a denial must not be arbitrary." Cert. Pet. App. C 10. The court concluded that in the present case the refusal of Real's witness request had in fact been arbitrary because the prison authorities failed at the hearing to present any evidence "indicating the reason why [Real's] request to call two inmates as witnesses was denied." *Id.*[20]

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[20] That the Superior Court judge was referring to the failure of the authorities to present evidence at the *judicial* hearing and not at the

On appeal, the Supreme Judicial Court held that "[t]he trial judge properly concluded that the sanctions resulting from a constitutionally flawed disciplinary hearing were invalid, and correctly ordered the return of Real's good time credits." Cert. Pet. App. A 22.[7] Although it was not necessary to its resolution of the dispute between the parties, the appellate court also ruled that the departmental regulations were unconstitutional because of their failure to require some support in the administrative record for the denial of witnesses requested by an inmate. *Id.*[8] There are, therefore, two separate and distinct grounds upon which the lower court's judgment may be affirmed. *First*, the narrower ground upon which the trial judge relied is that the arbitrary denial of Real's request for witnesses violated his right to due process of law. *Second*, the broader ground upon which the Supreme Judicial Court

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disciplinary hearing is clear from the colloquy between the judge and the assistant attorney general concerning the reasons for denying witnesses. The judge was referring to the court proceedings when he said that "[A]ll they have to do is come in and explain why. They haven't seen fit to show up here or to say anything about it. They don't care." J.A. 33a.

[7] The Supreme Judicial Court did, however, reverse the trial court's judgments because the form of relief was wrong. It remanded the case "for an entry of judgment declaring the rights of the plaintiff and ordering relief consistent with the principles set forth in our opinion." Cert. Pet. App. A 26.

[8] Because the regulations are silent on their face with respect to the nature of the record the disciplinary board must make, the Supreme Judicial Court in effect construed the regulations to authorize the board to deny witnesses without providing some support in the record of the hearing for its decision to do so. The reasonableness of this interpretation of state regulations by the highest court of the state is not open to review by this Court. *See O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974); *Kingsley International Pictures Corporation* v. *Regents*, 360 U.S. 684, 688 (1959). The only issue properly presented with respect to this aspect of the Supreme Judicial Court's opinion, therefore, is whether due process requires there to be some support in the administrative record for a disciplinary board's denial of witnesses requested by an inmate.

additionally relied is that the failure of the administrative record of the disciplinary hearing to provide some support for the disciplinary board's refusal to call witnesses requested by Real violated his right to due process of law. This Court, of course, "reviews judgments, not statements in opinions," *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956), and the judgment below can be affirmed on either rationale.

A. The Denial Of Real's Witnesses Was Arbitrary And Thus Violated His Right To Due Process Of Law.

This Court has repeatedly recognized that a " 'fundamental requisite of due process of law is the opportunity to be heard' . . . in a meaningful manner." *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970), quoting *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). *See Kent* v. *United States*, 383 U.S. 541, 554 (1966); *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 342 (1968); *Bell* v. *Burson*, 402 U.S. 535, 541-542 (1971). Particularly where the government is seeking to deprive an individual of or restrict his personal liberty, the Court has insisted that he or she be accorded the opportunity to present a meaningful defense, including the right to present witnesses. *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972); *Wolff* v. *McDonnell*, 418 U.S. 539, 566 (1974); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 786 (1973); *Vitek* v. *Jones*, 445 U.S. 480, 494-496 (1980). Thus in *Washington* v. *Texas*, 388 U.S. 14, 18 (1967), the Court said:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the [factfinder] so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *This right is a fundamental element of due process of law.*

(emphasis added). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973). *See*

also Faretta v. *California*, 422 U.S. 806, 818 (1975) (the calling and interrogation of favorable witnesses are among the procedures considered fundamental to the fair administration of American justice); *In re Oliver*, 333 U.S. 257, 273 (1948) (the right to offer testimony is among the basic rights in our system of jurisprudence).

These considerations led this Court in *Wolff* v. *McDonnell*, 418 U.S. 539, 566 (1974) to hold: "that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." While the Court recognized that "the right to present evidence is basic to a fair hearing," it held that "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority . . ." *Id.* In *Baxter* v. *Palmigiano*, 425 U.S. 308, 321 (1976), the Court reiterated that "[t]he right to call witnesses, like other due process rights delineated in *Wolff*, is thus circumscribed by the necessary mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."

The lower federal courts that have been called upon to interpret and apply this Court's mandate in *Wolff* have uniformly held that the right of an inmate to call witnesses in his defense is essential to insuring fairness in the administration of prison discipline. *See, e.g.*, *McCann* v. *Coughlin*, 698 F.2d 112, 122 (2d Cir. 1983) (right to call witnesses and present evidence "is fundamental to our system of justice and an important aspect of fair adjudication"); *Dalton* v. *Hutto*, 713 F.2d 75, 77 (4th Cir. 1983) (this right is "part of the substantive foundation of procedural due process for inmates"); *Smith* v. *Rabalais*, 659 F.2d 539, 542 (5th Cir. 1981) (the right is one of the "positive minimum requirements of procedural due process"); *Redding* v. *Fairman*, 717 F.2d 1105, 1114 (7th Cir. 1983) *cert. denied*, 104 S.Ct. 1282 (1984) ("[t]he right to call witnesses is basic to a fair

hearing"); *Bartholomew* v. *Watson*, 665 F.2d 915, 918 (9th Cir. 1982) (same).[20]

These courts have also recognized that when prison authorities deny an inmate's request to call witnesses on his or her behalf their decision is subject to judicial review. While there is considerable discretion on the part of prison officials to refuse to permit witnesses, the inmate's right would be rendered meaningless unless there were some way to insure that this discretion was exercised in accordance with legitimate correctional and institutional goals. *See Woods* v. *Marks*, 742 F.2d 770, 774 (3rd Cir. 1984). Indeed, there has been virtually no disagreement with Justice Marshall's statement that "if prison authorities persist in a niggardly interpretation of the inmates' right to call a witness, it must ultimately be up to the courts to exercise their great responsibility under our constitutional plan and enforce this fundamental right." *Wolff*, 418 U.S. at 584 (dissenting opinion). Courts have recognized that a limited judicial review of disciplinary hearings to insure that an inmate's constitutional rights have been respected is appropriate. *See, e.g.*, *Hurney* v. *Carver*, 602 F.2d 993, 995 (1st Cir. 1979); *Woods* v. *Marks*, 742 F.2d at 773; *Hayes* v. *Walker*, 555

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[20] State courts have been equally emphatic with respect to the critical importance to a prison inmate of the right to call witnesses. *See, e.g.*, *Williams* v. *Davis*, 386 So.2d 415, 419 (1980) ("Due process requires that prisoners be allowed . . . to introduce witnesses in their own behalf"); *McGinnis* v. *Stevens*, 543 P.2d 1221, 1230 (Alaska, 1975) ("Absent a right [to call witnesses] . . . a disciplinary hearing cannot be characterized as fair in the due process sense"); *Calkins* v. *May*, 97 Idaho 402, 404, 545 P.2d 1008, 1010 (1978) (the right to call witnesses is among "the minimum procedural requirements for disciplinary hearings . . ."); *Jenson* v. *Satran*, 332 N.W.2d 222, 226 (N.D. 1983) ("the Fourteenth Amendment Due Process Clause requires the state prison's disciplinary proceedings to afford an inmate the right to call witnesses . . ."); *Wilson* v. *Superior Court*, 21 Cal. 3d 816, 825, 582 P.2d 117, 124, 148 Cal. Rptr. 30, 37, (1978) ("a prisoner must be given . . . an opportunity to present witnesses . . ."); *State ex rel. Irby* v. *Israel*, 95 Wis. 2d 697, 703, 291 N.W.2d 643, 646 (Wis. Ct. App. 1980) ("the minimum requirements of procedural due process" include the right to call witnesses).

F.2d 625, 629-630 (7th Cir. 1977) *cert. denied*, 434 U.S. 959 (1977) *(Hayes I)*; *Jenson* v. *Satran*, 332 N.W.2d at 230; *McGinnis* v. *Stevens*, 543 P.2d at 1236, n.45; *Bonney* v. *Oregon State Penitentiary*, 270 Or. 79, 89, n.6, 526 P.2d 1020, 1025 n.6 (1974); they have overturned sanctions imposed when they have determined that the refusal to call witnesses on the inmate's behalf was arbitrary or an abuse of discretion. *See McCann* v. *Coughlin*, 698 F.2d at 123; *Hayes* v. *Thompson*, 637 F.2d 483, 488-489 (7th Cir. 1980) *(Hayes II)*; *Ex Parte Bland*, 441 So.2d 122, 125 (Ala. 1983); and they have invalidated regulations which arbitrarily limit the inmates' right. See *Dalton* v. *Hutto*, 713 F.2d at 78; *Bartholomew* v. *Watson*, 665 F.2d at 918; *McGinnis* v. *Stevens*, 543 P.2d at 1230; *Bonney* v. *Oregon State Penitentiary*, 270 Or. at 90, 526 P.2d at 1026.

In the present case, the Superintendent concedes that the right of an inmate to call witnesses in his or her defense is a "basic principle of due process" and an "important procedural right deserving of judicial protection." Pet's Br. 47-48. He also concedes that if "an inmate is denied a requested witness, important to his defense, for some reason other than one relating to the proper concerns of prison administrators, the inmate certainly has recourse in the courts, where he may allege and prove the wrongful conduct of the prison officials . . ." *Id.* at 48-49.

This is, however, precisely what Real did. In his *pro se* petition he alleged that "the Disciplinary Board deprived Petitioner of his Due process rights and Acted Arbitrary and Capricious in Denying Petitioner Due Process." J.A. 12a. The trial court conducted a hearing at which Real testified that he had been denied requested witnesses at two disciplinary hearings and at which the prison authorities, although given ample opportunity to do so, were unable or unwilling to explain or justify their denials on the basis of "the proper concerns of prison administrators." The trial court concluded that the disciplinary boards had denied Real's requests for witnesses arbitrarily in both cases and thus had violated his right to due

process of law. This was affirmed by the Supreme Judicial Court on appeal. Cert. Pet. App. A 22.

The disposition of Real's claim by the trial court was clearly correct. However broad is the discretion committed to prison officials in connection with the administration of prison discipline, it is not unbounded. *Woods* v. *Marks*, 742 F.2d at 774; *Hayes I*, 555 F.2d at 629; *Cardaropoli* v. *Norton*, 523 F.2d 990, 998 (2d Cir. 1975). Courts must exercise oversight of the process to insure that the prison officials act within constitutional limits. As one court stated:

> We are persuaded that the Supreme Court in *Wolff* did not intend to limit judicial review of prison officials' exercise of discretion to the extent that a prisoner's limited right to call witnesses could be arbitrarily denied in any case and thereby be rendered meaningless. On the contrary, *Wolff* contemplated a *balancing* of "the inmate's interest in avoiding [disciplinary sanctions] against the needs of the prison . . ."

Woods v. *Marks*, 742 F.2d at 774.

The inquiry by the trial court in the present case did not significantly intrude upon the state's administration of its prison system. It is a state trial court of general jurisdiction in the county in which Massachusetts' only maximum security prison, M.C.I. Walpole, and a large medium security prison, M.C.I. Norfolk, are located. As such it is familiar with prisoner civil rights litigation and sensitive to the concerns of prison officials.[20] Moreover, its review was appropriately limited to whether the action of the prison officials was arbitrary.

The Superintendent's claim that there is no basis for concluding that Real was arbitrarily denied witnesses, Pet's Br. 50, simply ignores the fact that the trial court's finding is amply

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.[20] For example, in January, 1983, the Norfolk Superior Court began holding periodic sessions within the prison at M.C.I. Walpole in order to process prisoner cases more expeditiously and to ease the burden upon the administration of having to transport prisoners and others to court. 11 *Massachusetts Lawyers Weekly* 353, 376 (Dec. 13, 1982).

supported by the record. Real testified that he had been denied witnesses requested by him at disciplinary hearings on the basis of which he lost a total of 300 days of good time in March, 1980, and February, 1982. J.A. 24a-29a. He explained that the correctional officer he had requested for the March, 1980, hearing was an "important witness" who would have supported Real's self-defense claim. J.A. 27a. It can be inferred from the pleadings that the two inmates Real requested as witnesses for the February, 1982, hearing had been present in the metal shop at the time of the fight between the officer and the inmate and would corroborate his version of what took place. J.A. 11a.[31]

On this basis, Real made a sufficient showing that the testimony of the witnesses was relevant and would have been favorable to his defense. *Cf. United States* v. *Valenzuela-Bernal*, 458 U.S. 867 (1982). The Superintendent did not challenge the sufficiency of Real's request for witnesses in the trial court nor has he argued in this Court or in the Supreme Judicial Court that it was inadequate to trigger the constitutional protection. The regulations do not place any burden on an inmate to make an affirmative showing of relevance or materiality. *See* 103 CODE MASS. REGS. § 430.14(6). Indeed, it can be assumed that a request for a witness at a disciplinary hearing is based upon the inmate's belief that the witness will testify relevantly and favorably.[32] In view of the fact that an inmate will ordinarily be unrepresented at a disciplinary hearing, it would be inappropriate to hold him to a standard required of counsel. *Cf. United States* v. *Valenzuela-Bernal*, 458 U.S. at 867-868.

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[31] In the handwritten form, Real requested as witnesses the reporting officer, Baleyko, the officer who was in the fight and got hurt, and two inmates. J.A. 18a. In his petition he explained that the two inmate witnesses were in the metal shop at the time of the fight. J.A. 9a-11a.

[32] "The right to call witnesses at a disciplinary hearing may not be abrogated simply because the witness's testimony might later be found unpersuasive." *McCann* v. *Coughlin*, 698 F.2d at 123 n.12.

On this record it was proper for the trial judge to require prison authorities to come forward with some legitimate explanation of their refusal to honor Real's request. Even assuming that Real would bear the ultimate burden of persuading the court that the denial was arbitrary, *see* Pet's Br. 56 n.10, it is reasonable to require, at a minimum, that the prison authorities articulate to the court the basis for their action in the face of an inmate's claim that his due process rights were violated. *Cf. Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 578 (1978). After all, "the facts necessary to underpin a finding that prison security would be adversely affected should a particular witness testify will be solely within the knowledge of prison officials, not prison inmates." *Hurney* v. *Carver*, 602 F.2d at 996 (Bownes, J., dissenting). And "[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within knowledge of his adversary." *Campbell* v. *United States*, 365 U.S. 85, 96 (1961).

The failure of the Superintendent in the present case to make any claim that Real's witnesses were not relevant or to make any showing that the disciplinary board acted on the basis of legitimate correctional considerations warranted the finding by the trial court that the board had acted arbitrarily. In *Hughes* v. *Rowe*, 449 U.S. 5 (1980), a prisoner alleged in his *pro se* complaint that he had been placed in segregation without a prior hearing in violation of his right to due process. In dismissing the complaint the district court relied upon a departmental regulation which authorized segregation of prisoners pending investigation of disciplinary matters, where required "in the interest of institutional security and safety." *Id.* at 12. This Court reversed, however, holding that the dismissal was improper *"[i]n the absence of any showing* that concern for institutional security and safety was the basis for immediate segregation of [the inmate] without a prior hearing . . ." *Id.* (emphasis added). It concluded that the complaint "was adequate at least to require some response from [the prison authorities] by way of affidavit or otherwise, to [the inmate's] claim that he was unjustifiably placed in segregation without a prior hearing." *Id.* It follows in the present case that

Real established that his right to due process had been violated when, in the face of *evidence* rather than mere allegations that he had been denied relevant witnesses in his defense, the authorities made no showing whatsoever that the denial was based upon any concern for "institutional safety or correctional goals" as required by their own regulation. *See* 103 CODE MASS. REGS. § 430.14(6).

It cannot "easily be assumed," as the Superintendent now suggests, that the disciplinary board denied Real's request because it thought that the witnesses' testimony was irrelevant or unnecessary to its findings. Pet's Br. 51 n.8. Counsel's speculation in this Court cannot substitute for the explanation and evidence that the Superintendent should have presented to the trial court. Therefore, the principle that the plaintiff is entitled to judgment on the merits when the defendant is silent in the face of a prima facie showing is applicable here, *see Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981), and requires affirmance of the judgment below.

B. Due Process Requires Some Support In The Administrative Record For The Refusal Of Prison Authorities To Call Witnesses Requested By An Inmate.

This Court has often connected "the fundamental procedural due process guarantee of an opportunity to be heard with the requirement that the government officially provide an *explanation* (ordinarily in writing) for action which adversely affects particular individuals or groups." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 554 (1978). As this Court explained in *Wolff*: "[T]he provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly." 418 U.S. at 565. The requirement of a statement of reasons may also contribute to the rationality of the process by forcing the decision-maker to focus attention on relevant considerations and to develop a consistent set of principles. *See Dorszynski* v. *United States*, 418 U.S. 424, 455 (1974) (Marshall, J. dissenting). In addition, "[e]xperience teaches . . . that affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963). Although the occasion when an explanation of reasons is required by due process has been characterized as the exception rather than the rule, *Harris* v. *Rivera*, 454 U.S. 339, 344 (1981) (per curiam), the Court has often included the right to an explanation as a basic requirement of due process. *See Wolff*, 418 U.S. at 564-566; *Morrissey* v. *Brewer*, 408 U.S. 471, 488 (1972) (revocation of parole); *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970) (termination of welfare benefits); *North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969) (increased sentence after a new trial); *cf. Kent* v. *United States*, 383 U.S. 541, 561 (1966) (statute requires statement of reasons for waiver of juvenile court jurisdiction).

Not only has such an explanation been required where the decision at issue may result in the deprivation of a substantive liberty or property interest, but the Court has required it as well where important *procedural* rights are at stake. Thus, in *Gagnon* v. *Scarpelli*, 411 U.S. 778, 790-791 (1973), after recognizing a limited right to appointed counsel in probation revocation proceedings, the Court went on to require that "in every case in which a request for counsel at a preliminary or final hearing is refused, the grounds should be stated succinctly in the record." And in *Vitek* v. *Jones*, 445 U.S. 480, 494-495 (1980), the Court affirmed the District Court judgment that the protections which must be afforded to a prison inmate before his transfer to a mental hospital include "[a]n opportunity at the hearing to present testimony of witnesses by the defense . . . , except upon a finding, not arbitrarily made, of good cause for not permitting such presentation . . ."

Although in *Wolff* this Court recognized the utility of a statement of reasons by the disciplinary board for refusing to call a witness, it did not require it because of concern that such a requirement might hobble prison officials in the exercise of their discretion. The ruling by the Supreme Judicial Court in

the present case is not in conflict. It recognizes the concerns this Court expressed in *Wolff*, and its requirement that there only be some support in the record for a refusal to call witnesses allows for the necessary flexibility in the disciplinary process. For example, it would be satisfied where the inmate's request itself indicates that the witnesses would be cumulative. *E.g., Langton* v. *Berman*, 667 F.2d 231, 234 (1st Cir. 1981) (no denial of due process where inmate was allowed to call three of ten requested inmates).[25] The record of the evidence presented at the hearing, moreover, might reveal that the requested witnesses were irrelevant. *See, e.g., Jenson* v. *Satran*, 332 N.W.2d at 229-230 (N.D. 1983) (no denial of due process where inmate admitted the rules violation at the hearing, thereby rendering the testimony of his witnesses irrelevant). On the other hand, where the refusal to call witnesses was based upon reasons which would ordinarily only be known to prison officials, such as institutional security or an inmate's personal safety, the board would be under an obligation to provide some explanation.

The requirement that there be some support in the record forces the disciplinary board to make decisions on the basis of evidence rather than conjecture.[26] It is also, as one court noted, "central to the effectiveness of judicial review in insuring that a prisoner has not been subjected to arbitrary action by prison

[25] Unlike the Massachusetts Department of Correction regulation, some regulations require the inmate to make an offer of proof or a showing of relevance prior to being entitled to have a particular witness called. *See, e.g.*, MD. ADMIN. CODE, *Adjustment Procedure*, DCR 105-2 ("In the event an inmate has requested a large number of witnesses whose testimony may be cumulative or irrelevant, the inmate shall be brought before the Adjustment Team as soon as possible so that the team may make a decision as to which of the witnesses should be brought in to testify.")

[26] *See State ex rel. Meeks* v. *Gagnon*, 289 N.W.2d 337, 363 (Wis. App. 1980) where the court noted:

> One important reason for requiring an agency to set forth written reasons for its decision is to force the administrator to go through the decision-making process: to pick and choose among conflicting facts, to reach a result based on the facts so found, and to articulate that process in writing. Decisionmaking is difficult and may be unconsciously avoided unless it must be done in a fixed way. The act of assembling and enunciating reasons in writing forces the act of reasoning and prevents its opposite, arbitrariness.

officials." *Hayes II*, 637 F.2d at 488. An inmate's right to call witnesses in his defense would be of little value if it could be denied on the basis of unreliable "post-hoc rationalizations" of prison officials. *Id.* Finally, a procedure where no justification for official action need appear will encourge lawless decision-making and reinforce the inmate's perception of unfairness.[27]

The Superintendent's contention that such a requirement "poses extra difficulty with respect to internal security," Pet's Br. 60-64 is both speculative and unrealistic. Since it is the inmate's right to call witnesses in his defense that is at issue, the occasions when an inmate will request that an informant or a recalcitrant inmate be called as a witness in his favor will be rare. Even in those situations, moreover, it does not follow that the facts would have to be divulged to the inmate. Just as the statement of the evidence relied upon and the reasons for the sanction imposed at a disciplinary hearing may exclude certain items "when personal or institutional safety are so implicated," *Wolff*, at 565, an explanation for not calling witnesses could be omitted for the same reasons. A record of the basis for refusing to call witnesses could be preserved in case of a later legal challenge but not made available to the inmate.[28]

[27] "The cultivation of a sense of fair dealing in the offender would appear to be helpful, if not essential, in attaining one of the principal goals of [the] correctional process, the rehabilitation of the offender." Kadish, *The Advocate and the Expert-Counsel in the Penal Correctional Process*, 45 MINN. L. REV. 803, 830 (1961). This observation was echoed by this Court in *Morrissey* v. *Brewer*, 408 U.S. at at 484:

> [Society has an] interest in treating the [prisoner] with basic fairness: fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

[28] *See, e.g.*, 28 C.F.R. § 541.17(f)(2) (1982). These Federal Bureau of Prisons regulations provide that when a disciplinary committee's decision is based on confidential informant information and when

Recognizing the simplicity of such a solution, the Superintendent suggests that the very fact of nondisclosure will "raise suspicions in the charged inmate's mind." Pet's Br. 62. That there is a possibility that such a situation may arise, however, hardly justifies the rejection of what serves a fundamental constitutional interest in the vast majority of cases. In the unusual case it may well be that the authorities will have to forego a disciplinary prosecution so as to avoid divulgence of sensitive information. *See Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957) (where disclosure of informant information is essential to a fair determination of a cause, the informant privilege must give way or the action must be dismissed). But that is a small price to pay for making the inmate's right to call witnesses more meaningful and thereby improving the quality of justice meted out at prison disciplinary hearings.[27]

The Superintendent also claims that the requirement of some support in the record for a refusal to call witnesses will "involve some additional cost in time and resources, to the detriment of the penological mission as a whole." Pet's Br. 65. However, what Justice Marshall said in *Board of Regents* v. *Roth*, 408 U.S. 564, 591 (1972) (dissenting opinion) is equally applicable here:

> The short answer to that argument is that it is not burdensome to give reasons when reasons exist . . . It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action . . . As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

Indeed, the Superintendent makes no attempt to explain his fanciful claim that the modest requirement of record support for refusals to call witnesses will "contribute to a proliferation of prisoner lawsuits . . . promote an adversarial atmosphere within the prison . . . [and] may contribute to the growth of prison bureaucracy." Pet's Br. 65-67.[28]

The argument that requiring prison authorities to provide some explanation for a refusal to permit witnesses to testify in an inmate's defense will threaten institutional security runs counter to the policies and recommendations of reputable authorities in the area of prison administration and criminal justice. The American Correctional Association has adopted the following standard for the procedures to be followed in disciplinary hearings:

> Written policy and procedure provide that the inmate is given an opportunity to make a statement and present documentary evidence, and may request witnesses on his/her behalf; *reasons for the denial of such a request are stated in writing*. (Essential).[29]

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documenting its findings as to the reliability of the informant would reveal the informant's identity the "finding as to the reliability of each confidential informant relied on and the factual basis for that finding shall be made part of the hearing record in a separate report, prepared by the IDC chairman, not available to the inmate."

[27] Even if the prison authorities were not required to disclose the basis for not calling a witness in the record of a disciplinary hearing, they could not escape the duty to make such disclosure in court if the inmate challenged the denial of witnesses as arbitrary. *See Hughes* v. *Rowe*, 449 U.S. at 12. Thus, unless the Superintendent takes the position that he can never be called to account for a refusal to call witnesses—a position which would render the inmate's right totally meaningless—prison authorities will at some point have to explain their refusal to call witnesses.

[28] Nor does he offer any explanation for his cryptic statement that where a refusal to call witnesses is based upon concerns about conditions within the institution, "explanation about those conditions may only exacerbate them." Pet's Br. 61. Indeed, petitioner does not cite the opinion of a single penologist or other expert in support of his position that a requirement of record support for refusals to call witnesses will in any way threaten institutional security or interfere with prison administration.

[29] American Correctional Association, Standards For Adult Correctional Institutions, Standard 2-4363 (2d ed. 1981). *See also* American Correctional Association, Standards For Adult Local Detention Facilities (2d ed. 1981). Standard 2-5321 similarly provides: "Written policy and procedure provide that the inmate is given

(emphasis added). In its comprehensive regulation of prison discipline, the Federal Bureau of Prisons provides that an inmate has:

> the right to submit names of requested witnesses and have them called to testify . . . provided the calling of witnesses . . . does not jeopardize or threaten institutional or an individual's security . . . *The chairman shall document reasons for declining to call requested witnesses in the [Institutional Disciplinary Committee] report.*

28 C.F.R. § 541.17(c) (emphasis added).[a] Moreover, the prison systems in at least fourteen other jurisdictions require written reasons for the denial of witnesses. See Babcock, *Due Process in Prison Disciplinary Proceedings*., 22 B.C. L.Rev. 1009, 1070-71 n.507 (1981).[a] It is significant that none

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an opportunity to make a statement and present documentary evidence, and to have in attendance at a disciplinary hearing any person who has relevant and not unduly cumulative information, except when doing so may jeopardize the life or safety of persons or the security or order of the facility; *such reasons for denial are stated in writing*. (Detention-Important, Holding-Important)." (emphasis added); American Correctional Association, Correctional L. Project, Model Correctional Rules and Regulations, 9, Section III C.3.b. (1977) provides that an inmate charged with a major offense should be entitled to: "An opportunity to call witnesses on his behalf; unless doing so would be irrelevant redundant or unduly hazardous to institutional safety; *such reasons for denial to be stated in writing* . . ." (emphasis added). The commentary to model regulation explains that since "presenting one's defense through the use of witnesses is both important and equitable . . . a valid reason for denying this right should be stated and to allow its review, it should be done in writing." *Id.* at 13.

[a] This Court has given "great deference" to the policies, regulations, and opinions of the administrators of the Federal Bureau of Prisons. *See Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 849 (1974); *Procunier* v. *Martinez*, 416 U.S. 396, 414, n.14 (1974).

[a] Babcock reports that written reasons are required in Alabama, Alaska, California, Colorado, Illinois, Indiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Oregon, and the District of Columbia. *See, e.g.*, Cal. Pen. Code § 2932a)(3): "The prisoner may

of these proposed or actual regulations makes any exception to the requirement of a statement of reasons on the basis of the concerns expressed by the Superintendent. Finally, the American Bar Association has formally adopted a standard for disciplinary hearings involving the imposition of a major sanction where the inmate is entitled to examine "any person within the local prison community who has relevant information . . . except when the hearing officer(s): (i) exclude testimony as unduly cumulative."[a] The commentary to the standard notes that the hearing officer "must record the reasons for refusing a prisoner-respondent's request that identified witnesses attend."[a]

The procedure mandated by the Supreme Judicial Court in the present case will tend to encourage deference by the courts to the judgments of prison officials, and it will minimize interference by them in the administration of discipline. In the first place, it will provide a means whereby prison officials can themselves correct erroneous decisions by disciplinary boards in the course of an administrative appeal.[a] Moreover, where the authorities have provided some support for their decision

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request witnesses to attend the hearing and they shall be called unless the person conducting the hearing has specific reason to deny this request. Such specific reasons shall be set forth in writing and a copy of such document shall be presented to the prisoner." In addition, written reasons are required by regulation in Iowa. *See, Kelly* v. *Nix*, 329 N.W. 2d 287, 294 (Iowa, 1983).

[a] American Bar Association, Standards For Criminal Justice, Legal Status of Prisoners, 23-35, Standard 23-3.2 (1983).

[a] *Id.* at 23.39 n.9. *See also* National Conference of Commissioners On Uniform State Laws, Model Sentencing and Corrections Act, Section 4-507, (1979) (an inmate has a right to witnesses but a person is not required to appear "if the hearing officer makes a written factual finding that to do so would subject a person to a substantial risk of physical harm."

[a] 103 Code Mass. Regs. § 430.181) provides:

> An inmate may appeal the finding and/or sanction of the disciplinary board regarding a major matter or an appeal of a minor

in the administrative record, a court's review will for the most part be limited to a determination of whether the reason for the refusal to call witnesses is a valid one. As in the case of judicial review of the action of an administrative agency, the decision would be entitled to a presumption of regularity. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971); the scope of review would be narrow in recognition of the expertise of the prison authorities, *id.* at 416; and review would be limited to the administrative record already in existence. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). "[I]nquiry into the mental processes of administrative decision-makers" is generally not appropriate, *Citizens to Preserve Overton Park*, 401 U.S. at 420, and live testimony from the prison officials or the inmate would not be required. It is likely, therefore, that most cases could be decided on the basis of the record of the disciplinary hearing on a motion for summary judgment filed by either party. *Cf. Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

In contrast, if no basis for the disciplinary board's action is provided in the administrative record a court will be required to make a far more intrusive and burdensome examination. The prison officials would necessarily be called upon to justify a decision made months or years earlier and they would be subject to discovery and cross-examination. In the absence of some support in the record they may be unable to meet their burden of providing a reason simply due to lack of memory and, in any case, their "post hoc rationalizations" of the decision would be entitled to little weight. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 420; *Hayes II*, 637 F.2d at 486. Furthermore, the inmate will be more likely to institute litigation if that is the only way the prison authorities can be compelled to justify their refusal to call witnesses. *Hayes II*, 637 F.2d at 486.

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matter to the superintendent within five (5) days following the inmate's receipt of the disciplinary board's written decision.

From July 1, 1979 to December 31, 1979 superintendents at Massachusetts prisons changed the finding or sanction in 29.1% of the guilty dispositions they reviewed. *See* C. Metzler, Disciplinary Report Statistics, July 1, 1979 to December 31, 1979, Massachusetts Department of Correction, Pub. No. 12284, 8.

In *Wolff*, this Court noted that its decision with respect to the procedures required by the Constitution at prison disciplinary hearings was "not graven in stone" and that "[a]s the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court." *Id.* at 372. Prison practices are no longer as "diverse and somewhat experimental," and in the ten years since *Wolff* the importance of adopting procedures which assure fairness in disciplinary hearings has been widely recognized. The ruling of the Supreme Judicial Court is fully in accord with this development. It will reduce arbitrariness in decisions affecting prisoners' fundamental due process right to present a defense at a disciplinary hearing without unnecessary intrusion by the courts into the administration of prison discipline. As such, the decision represents a reasonable accommodation between the interest of the inmates and the needs of the institution, and should be affirmed.

CONCLUSION

Insofar as the present case is moot, this Court should vacate the judgment of the Supreme Judicial Court and remand for such proceedings as that court may deem appropriate. *DeFunis* v. *Odegaard*, 416 U.S. at 320. In the event that this Court reaches the merits, however, the judgment below should be affirmed.

Respectfully submitted,

JONATHAN SHAPIRO
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Counsel for Respondent

December 15, 1984

APPENDIX

BEST AVAILABLE COPY

MCI-WALPOLE
FORFEITURE OF GOOD TIME

INMATE John Real NUMBER W-37170 DATE 5-20-80

SENTENCING DATA Poss. shotgun, barrel less than 18" 3-5-yrs.

EFFECTIVE DATE 1-24-79 P.E. DATE 1-23-80

GOOD TIME DAYS EARNED 750 LOST 60 AS OF 5-20-80

I am recommending that 150 days good time of the above-named inmate be forfeited because he has been found guilty of D-report # 80-338—Killing; Violtg. law of Commonwealth of Mass. by a disciplinary board. Attached is a copy of the disciplinary report and the disciplinary board's findings and sanctions.

OTHER COMMENTS BY SUPERINTENDENT _____

SIGNATURE /s/ Joseph Ponte DATE 5-21-80
(Superintendent)

COMMENTS BY ASSOCIATE COMMISSIONER I Concur.

SIGNATURE /s/Fred A. Butterworth DATE 6-4-80
(Associate Commissioner)

DECISION BY COMMISSIONER
(Check A or B)

A. I hereby order that no good time of inmate _____ be forfeited at this time.

B. I hereby order that 150 days good time of inmate John Real be forfeited.

/s/William T. Hogan Jr. Date 6/5/80
(Commissioner of Correction)

Dept. of Correction
Div. of Classification
Jun 18 1980

For institutional use:
GCD _____
LFT _____
ADJUSTED GCD _____

MCI-WALPOLE
FORFEITURE OF GOOD TIME

INMATE John Real Number W-37170 Date 6-11-82

SENTENCING DATA Poss. shotgun, barrel less than 18" 3-5 yrs

EFFECTIVE DATE 1-24-79 P.E. Date 1-23-81

GOOD TIMES DAYS EARNED 750
LOST _____ AS OF 6-11-82

I am recommending that 200 days good time of the above-named inmate be forfeited because he has been found guilty of D-report #81-4065 Participating in a roit by a disciplinary board. Attached is a copy of the disciplinary report and the disciplinary board's findings and sanctions.

OTHER COMMENTS BY SUPERINTENDENT _____

SIGNATURE /s/ Joseph Ponte DATE 6-24-82
(Superintendent)

COMMENTS BY ASSOCIATE COMMISSIONER Reduce to 150 days loss of Good conduct credits.

SIGNATURE /s/ William F. Callahan DATE June 28, 1982
(Associate Commissioner)

DECISION BY COMMISSIONER
(Check A or B)

A. I hereby order that no good time of inmate _____ be forfeited at this time.

B. I hereby order that 150 days good time of inmate John REAL be forfeited.

/s/ Michael Fair DATE 7-2-82
(Commissioner of Correction)

For institutional use:
GCD _____
LFT _____
ADJUSTED GCD _____

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, SS.

Superior Court
Department of the Trial Court
No. 136442

John Real, *Plaintiff*(s)

vs.

Joseph Ponte, *Defendant*(s)

JUDGMENT

This action came on for Hearing before the court, Mitchell, J. presiding, and the issues having been duly heard and findings having been duly rendered,

It is Ordered and Adjudged:

The Respondent Ponte shall credit the petitioner with 150 days of good time

Dated at Dedham, Massachusetts, this 22nd day of June, 1982.

/s/Robert L. Moscow
Assistant Clerk

A TRUE COPY
Attest /s/
DEPUTY ASSISTANT CLERK

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, SS.

Superior Court
Department of the Trial Court
No. 136442

JOHN REAL, *Petitioner*

vs.

JOSEPH PONTE, Superintendent
MASSACHUSETTS CORRECTIONAL INSTITUTION,
WALPOLE, *Respondent*

RECEIVED & FILED
JUN 14 1982
CLERK OF THE COURTS
NORFORK COUNTY

FINDINGS, RULINGS AND ORDER ON PETITIONER'S WRIT OF HABEAS CORPUS

The petitioner, John Real, in the above-captioned case, has brought a petition for a writ of habeas corpus challenging the lawfulness of his imprisonment at the Massachusetts Correctional Institution at Walpole (MCI Walpole) for his conviction of the crime of possession of a shotgun. The petitioner alleges that his MCI Walpole sentence would have expired in January, 1982 but for the sanction of 150 days loss of good time imposed by the Disciplinary Board (Board) following a hearing where he was denied his constitutional due process rights.

Findings

On May 25, 1982, the petitioner proceeded pro se. Based on the evidence presented at the hearing, I make the following findings of fact:

1. On February 8, 1980, the petitioner was transferred to Block 10, the Departmental Segregation Unit (DSU), following the killing of an inmate at MCI Walpole.

2. On May 28, 1980, the petitioner with counsel, Attorney Russell Hodgdon, received a hearing on the alleged offense, i.e., killing of an inmate.

3. The petitioner requested the presence of two witnesses, namely, Correctional Officer Frank Bartlett (Bartlett) and Correctional Officer Joseph Gaffney (Gaffney). Only Bartlett appeared at the hearing.

4. Despite Gaffney's absence, the Board held the scheduled hearing.

5. At the hearing, the petitioner stated that he killed the victim in self-defense and that Gaffney would corroborate his account of the incident.

6. Based on evidence presented, the Board found the petitioner guilty of the offense charged and imposed sanctions, including 150 days loss of good time.

7. The petitioner appealed the Board's decision to the superintendent, who subsequently affirmed the decision.

Rulings

"The touchstone of due process is protection against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974). Where a state statutorily creates "liberty interests," i.e., freedom from isolation and the right to good-time credits, which may be forfeited only for serious misbehavior, due process rights come into play to insure that the state created "liberty interests" are not arbitrarily abrogated. *Id.* 557. *Cf. Kinney, petitioner*, 5 Mass. App. Ct. 457, 462 (1977) (due process applies when there is deprivation of liberty and property interests as provided by Fourteenth Amendment). Massachusetts provides statutory rights to good-time credits which a prisoner may lose if he violates any rules of his place of confinement. G.L. c.127, § 129. Also a prisoner has an expectation not to be isolated except for enforcement of discipline. *Id.* § 40. Thus, the minimal due process requirements set forth in *Wolff* are applicable herein, namely: (1) an advanced written notice of the alleged violation; (2) a written statement by the

factfinder as to the evidence relied on and reasons for the disciplinary action; and (3) the right to call witnesses and present evidence unless permitting the prisoner to do so would jeopardize the institutional safety or correctional goals. *Wolff* v. *McDonnell*, *supra* at 563-566. See 103 Mass. Code Reg. §§ 430.11, 430.14.

The third requirement is disposition of this case. Although a prisoner does not have an unlimited right to call witnesses and present documentary evidence, a denial must not be arbitrary. Only where the calling of a witness may be "unduly hazardous to the institutional safety or the correctional goals" may such a request be denied. *Wolff* v. *McDonnell*, *supra* at 566; 103 Mass. Code Reg. § 430.14(6). However, the respondent presented no evidence evincing the reason why the petitioner's request to have Gaffney present at the hearing was denied. The petitioner testified that Gaffney would have corroborated his self-defense argument. Therefore, I find the petitioner's due process right to call witnesses and present evidence was *arbitrarily* denied by the Board. Accordingly, I hold that the Board violated the petitioner's due process rights in imposing a sanction of 150 days loss of good-time credits.

Order

Wherefore, it is ordered that judgment enter ordering the respondent Punte to credit the petitioner 150 days of good time.

/s/Joseph S. Mitchell, Jr.
Justice of the Superior Court

MCI-WALPOLE
RESTORATION OF GOOD TIME

INMATE JOHN REAL Number W-57170 DATE 11-19-82

SENTENCING DATA Pos. shotgun. barrell less than 18" 3-5 yrs.

EFFECTIVE DATE 1-24-79 P.E. DATE 1-23-81

GOOD TIME DAYS EARNED _____
RESTORED 150 AS OF 11-19-82

I am recommending that 150 days good time of the above-named inmate be Restored because he has been found guilty of D-report #(80-328?) by a disciplinary board. Attached is a copy of the disciplinary report and the disciplinary board's findings and sanctions.

OTHER COMMENTS BY SUPERINTENDENT Court Ordered (SEE COPY OF COURT ORDER ATTACHED)

SIGNATURE /s/Joseph Ponte DATE 11-19-82
(Superintendent)

COMMENTS BY ASSOCIATE COMMISSIONER _____

SIGNATURE /s/Fred A. Butterworth DATE 11-24-82
(Commissioner)

DECISION BY COMMISSIONER
(Check A or B)

A. I hereby order that no good time of inmate _____ be forfeited at this time.

B. I hereby order that 150 days good time of inmate John REAL be restored.

/s/Michael Fair Date 11-24-82
(Commissioner of Correction)

For institutional use:
GCD 12-16-82
Restored 150
ADJUSTED GCD 7-31-82

DATE: 10-29-81

PREPARED BY: Fox

CHECKED

"DEDUCTIONS FROM SENTENCE" SUMMARY SHEET

Inmate & No.: John Real W-57170

Effective Date of Sentence: July 79

Period Beginning: July 1-79 / Date

Ending: Oct 29 81 / Date

GOVERNING RELEASE DATES

Parole	Minimum	Maximum	G.C.D.
1-23-81	1-23-81	1-23-81	1-3-83

Good Conduct _____ Camp _____
MCI D _____ Blood _____
Total Good Conduct Forfeiture 210 days
(Not to be included in Computation)

Time Last Request Denied _____
Camp _____
Blood _____

ADJUSTED RELEASE DATE
Includes Camp Time, Blood Time, MCI D Time

Parole	Minimum	Maximum	G.C.D.
—	—	—	1-3-83

MCI D (Only)

Program Activity	Inst. of Participation	Dates of Participation	# Recommended Deductions
a. Work	Walpole	21 1 at 2½	3½ days
b.			
c. Education GED		2 at 2½	5 days
d.			
e. Activity SLP		4 at 1	4 days
f.			

(CONTINUED ON OTHER SIDE)

Total Number of Days Recommended 12½ days

/s/ Joseph Ponte 10-29-81
Superintendent or Designee — Date

Total Number of Days Credited 12½

/s/ Michael V. Fair
Commissioner or Designee — Date 11/5/81

REVISED RELEASE DATES

Parole	Minimum	Maximum	G.C.D.
—	—	—	12.21½.81

BEST AVAILABLE COPY

The Commonwealth of Massachusetts

DEPARTMENT OF CORRECTION

CERTIFICATE OF DISCHARGE

Know all men by these presents:

It having been made to appear to the Commissioner of Correction that John P. Real, No. W-37160 a prisoner sentenced to The Massachusetts Correctional Institution Walpole is entitled to have the term of his imprisonment reduced by a deduction from the maximum term of said sentence or sentences for good behavior.

Now, Therefore, in accordance with the law so made and provided in Chapter 127 of the General Laws (Ter. Ed.) and Acts in amendment thereto it is ordered by the Commissioner of Correction that the said prisoner be, and is hereby discharged from further imprisonment on the 29th day of November, 1982
(Nunc Pro Tunc 7-19-82)

/s/Michael V. Fair
Commissioner of Correction: 11/29/82

Commissioner of Correction:

The above-named prisoner was discharged from imprisonment in accordance with the above order of the Commissioner of Correction on this 29th day of November, 1982

/s/Joseph Ponte
Superintendent

TO REMAIN CONFINED —
MCI CONCORD FROM AND AFTER